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ALAGAPPA UNIVERSITY

KARAIKUDI - 630 003, TAMILNADU.

DIRECTORATE OF DISTANCE EDUCATION

M.B.A. (Corporate Secretaryship)

(IV Semester)

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DRAFTING AND CONVEYANCING

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Paper 4.1

DRAFTING ANDCONVEYANCING

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Paper 4.1: DRAFTING AND CONVEYANCING

UNIT 1

General Principles of Drafting: Rules for drafting - Use of appropriate words and expressions - Aids to clarity and accuracy - Legal implications and requirements.

General Principles of Conveyancing: Meaning - Basic requirements of deeds of transfers - Description of deed, practices, recitals testatum - Consideration of operative words - Exceptions and reservations - Habendum - Testimonium - Signature and attestation - Endorsement and supplement deeds.

UNIT 2: Drafting of Orders and Contracts

Drafting Orders: Appointment orders - Suspension orders - Order of dismissal and discharge - Charge sheets - Apprenticeship agreements.

Drafting of Contracts: Agreements to sell/ purchase - Dealership contracts - Building contracts - Agency contracts - Collaboration agreements - Arbitration agreements

UNIT 3 : Deeds of Mortgages, Charges and Pledges

Different types of mortgage deeds - Deeds of further charge in mortgaged property - Mortgage by deposit of title deeds - Deeds of floating charges - Deeds of appointment of receiver - Other charges - Memorandum of pledge of movables.

UNIT 4 : Deed of Assignment

Business debts - Shares in a company - Policies in insurance - Patents, trade marks, copyrights - Business and goodwill and other rights and interests - Deed of exchange and gift deeds.

UNIT 5: Drafting of other Documents, Petitions and Applications

Drafting of applications and petitions to public financial institutions, appellate authorities under taxation and other corporate legislations.

UNIT 6: Deeds of Power of Attorney

Revocable - Irrevocable - General and Particular letters of authority – Appeals, writ petitions, special leave petition - Revision and review applications, affidavits.

REFERENCE BOOKS:

1. Bahl & Nagamaiya, Business Communication.
2. Sharma R C & Krishna Mohan, Business Correspondence and Report Writing.
3. 'CSI Study Material, secretarial Practice relating to Economic Laws.

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UNIT – 1

GENERAL PRINCIPLES OF DRAFTING

INTRODUCTION

Corporate executives come across different legal documents in their day to day to affairs. They also are required to handle situations involving different legal implications. This requires knowledge to interpret legal documents. On many occasions they are also required to draft or oversee the drafting of different forms, notices and documents which have a legal bearing on the functioning of the Company. Drafting and Conveyancing help the corporate executives to interact in different situations and solve legal complications faced by them in day to day business of the company. Drafting and Conveyancing not only involve legal sanctity but also shields the corporate from legal complications.

The legal system in our country is modeled on the British Concept. The English people who came to India for different purp ses introduced into India not only the legal rules know generally as the Common Law but also their traditions, outlook and techniques in establishing and maintaining the judicial system in India. The Charter of the Queen granted to the Company in the years 1600 and thereafter "Power to make, ordain and constitute such and so many reasonable laws, constitution, orders and ordinances etc as to them shall seem fit and necessary bearing in mind so always that the said laws, orders, constitutions and ordinances etc. be reasonable and not contrary or repugnant to the laws, statues and customs of this realm" This Charter of Queen Elizabeth was the forerunner to the Indian Jurisprudence and the techniques and methods used by the English legal luminaries was inherited and imbibed by the Indian legal system. Drafting and Conveyancing therefore had their origin so to say in the English Jurisprudence.

Drafting according to the Oxford Dictionary is an outline, plan, sketch or abstract of a document. Drafting can be defined as the synthesis of law and fact in a language form. It is the preparation of legal instruments such as Constitution, Statues, rules, regulations, orders, ordinances, contracts, conveyances, wills, trust, leases etc. Drafting involves two steps. Conceiving an idea and translating that idea into the document. Conception and expression in definitive form are the two pillars of good drafting. There is always a nexus

between law and fact and the language used to express it. Good legal practice demands good drafting. Even though it is not always possible to draw a blue print of perfect drafting, it should always be ensured that facts are presented in a systematized sequence to portrait a correct picture of legal status, rights and privileges. **Simplicity is the soul of good drafting.** Drafting requires serious thinking and reducing this to writing with the same sense and intention of the parties so that it is legally immune to challenge at the time of judicial interpretation.

It is observed from the above that good drafting requires enormous skill. A good draftsman should have the intrinsic knowledge of law and rules and command over the language to express his knowledge. Any drafting of documents requires two different qualities. Imbibing the facts of parties to the document namely their basic details and their inherent intentions concisely and clearly forms the first step to good drafting. Fulfillment of the requirements of law and correlating them to the facts and intentions is the second step. A document should not only be valid in the eye of law but must also incorporate all relevant facts which should be disclosed. To achieve this good drafter should have general knowledge of the law of the country and specific knowledge of the special enactments with which the document is closely related.

Customs, conventions, forms and logic form the important ingredients of any drafting. Every document as stated above is modeled on the basis of English legacy and concept. Good drafting must adhere to the Customs and conventions in vogue in the legal transactions. It must adapt the form which is commonly prevalent in practice and use the language which is jurisdictionally and technically acceptable. It should be logically sequenced in a legal language that confirms to legal interpretations and couched in phraseology that is intelligible to the layman. Apart from these general basics of Drafting there are a few rules to be adhered to while drafting any document. We shall discuss some of them below:

RULES FOR DRAFTING

Good drafting as discussed above requires legal knowledge and command of language. At the same time certain basic rules should be followed. This will ensure good drafting which is legally tenable and easily intelligible. The following rules should be kept in mind while drafting a document.

(a) **Conceive the Design:** Before drafting any document, the design and contents should be decided before hand. Drafting without designing the contents will lead to confusion and lack of clarity. It is therefore always advisable to draw the outline of any document to be drafted so that what all to be included can be included and things to be omitted can be omitted. All hidden knowledge of the subject can be brought to light while conceiving the design before hand.

(b) **Frame Work of the Draft:** Once the design is conceived the frame work of the draft should be prepared. Every point, idea and thought should be jotted down so that the gaps can be filled later in cogent language. This frame work should be appraised with facts and the provisions of law and then in actual drafting all the basic ingredients which we have discussed above like customs and conventions, form and logic can be spiced into it. In doing all this, it should be borne in mind that the document is easily understandable by a layman, unambiguous and forthright in its contents.

(c) **Fowler's Drafting Rules:** We have said above that simplicity is the soul of drafting. Fowler says that a good drafter should not be extravagant with his language or flashy in qualities but should be as far as possible simple, clear, logical and cogent. This implies the following for a drafter.

- ***Use words which are familiar*** and easily understandable as one important trait of a good document is that it is intelligible to the lay man.
- ***Use words which are real and material*** rather than intangible words for simple clear words will give clarity of thought and expression.
- ***Use words which are short and simple*** rather long and unfamiliar words for they cannot be easily understood and assimilated.
- **Use words which are simple and avoid long phrases** so that the reader gets the direct meaning of what is intended in the document.

- ***Use words which are direct and don't circumvent*** as that will make the reader confused and will not convey sense.

(d) **Special Laws to be Treated Specially:** There are a number of enactments which are special and have provisions of their own. The Companies Act 1956, The Transfer of Property Act 1882, Indian Trust Act 1882, Indian Lunacy Act 1912 to mention a few are special legislations. Drafting a document involving special legislations requires special care. Provisions of these legislations should be incorporated in documents wherever these statues are involved. For example in the Companies Act there are certain provisions involving Registrar of Companies which is a wing of administration of the Act. In the Indian Trust Act the names of Trustees and the estate they will administer is an important aspect. In the Transfer of Property Act operation of a transfer and restraint on transfers are special provisions. While drafting all these special provisions of special enactments should be recited at appropriate place. A drafter has to be careful in that wherever provisions exist in these special enactments to obtain permissions, recitals should contain the facts to that effect.

(e) **Vetting Documents:** Drafting a document must be done with great care. At the same time the drafted document has to be verified or tested by experts in the field. This makes the document perfect as the experienced persons have vetted it. Vetting of Memorandum and Articles of Association of a Company by the Registrar is an example of this verification. Verification of a deed of Transfer by the Registrar of properties under the Registration Act, a deed of trust under the Indian Trust Act by the Registrar of Trust are all examples of this verification. Vetting of a document adds impetus to its quality.

The above rules and concepts are only a few of the points to be kept in mind while drafting a document. But the minimum that is required to draft a document is sound legal acumen and fluency of language and thought and the ability to convey it keeping all the above ingredients of document in mind.

USE OF APPROPRIATE WORDS AND EXPRESSIONS

Drafting as we have seen requires command of language. Every language has its words and expressions which convey specific meaning at specific places. The choice of words and phrases in drafting assumes significance as the same

word can convey different meaning at different place. For example the word 'vicinity' can convey different meaning at different place. The house is in the vicinity will mean surrounding, district, locality area etc. But the expression the village's vicinity to Chennai will mean closeness or nearness or proximity to Chennai. Therefore a drafter has to be careful to use the word which conveys the appropriate meaning with reference to the context with which it is used. There are a number of prepositions which are used in English language. At, near, on, above, with etc are all prepositions which should be carefully used. Each will convey a sense of force at a particular place. The word **'immediate'** for example will mean urgency in the normal sense but the word **'immediate'** in the phrase **immediate vicinity** would mean adjacent or next or near. From this it is clear that the word chosen for drafting should be carefully selected and it should convey the appropriate meaning in the company of other words used in the sentence or phrase or expression. There are a number of common expressions used in drafting. Subject to, excepting, reserving, more or less, adjoining, contiguous, and part and parcel are some of them. Each has its own meaning at the place where it is used. 'Excepting' for example will mean exclusion from the general rule. It will also mean irregularity, inconsistency, peculiarity and freak ness in contexts in which it is used. 'Superficial' will mean exterior or external and it will also mean trivial, frivolous and silly. All these examples are suffice to conclude that the choice of words or expressions in drafting should be appropriate to the document, to the context and law and fact with which it is used.

'Deed of Gift' and 'Instrument of Will' are phrases which refer to documents. In legal expression we cannot refer to them as Deed of Will or Instrument of Gift. It is because the words deed and instrument have been judicially defined to convey a particular meaning. Therefore they can be used only in the manner in which they are recognized to be used in legal parlance. Using them differently though may not convey a different meaning to the document, it will definitely be not in consonance with the jurisdictional and technical requirements of law.

AIDS TO CLARITY AND ACCURACY

We have discussed earlier that simplicity is the rule of drafting. Clarity is the sign of simplicity. Similarly accuracy is the essence of drafting. Clarity and accuracy are therefore essential to any drafting. Clarity and accuracy can be had

by interpreting the documents. Interpretation of statues requires legal knowledge and usage of language. In every agreement, every deed, every instrument and every document the choice of words and their interpretation will definitely help to know the mind of the drafter. Interpretation of a statue is a process by which the Courts seek to interpret the will and mind of the legislature. Each word has its natural meaning and grammatical meaning. The interpreter has to interpret using both. Interpretations can be legal or doctrinal. Legal where the law requires something to be done, it is to be done as per law. For example if a document is to be filed with the Registrar of Companies under the Company law within two months of approval by the appropriate forum, it should be filed within two months and not later. Doctrinal where it relates to a particular principle or concept, for example the Doctrine of Indoor Management in Company law is a principle of presumptive adherence to law.

Clarity and accuracy is based on the choice of words and expression. Simple and unambiguous words will have precedence over ..ypothesis and jargons. If a statue does not contain clear words, then interpretation should be based on circumstances, the intention of the parties to the document, conditions prevalent and actual life situations.

There are several rules of interpretation. The rule of literal construction, the rule of harmonious construction and the rule of reasonable construction are some of them. The Golden rule of literal construction requires a document to be interpreted as intended by the parties. For example transfer of property can be done by a person having valid title to the property and competent to contract. Two things stated here are ownership of the property and competency of contract, that is, he is not a minor or lunatic or has the disabilities as prescribed by the Contract law. The interpretation in this case is literal and simple. The rule of harmonious construction requires a document should be interpreted in its totality. Every aspect of a statute, rule or document is integral part of that document and must be interpreted in the most harmonious way and not any part in isolation. The rule of reasonable construction in interpretation of a statue implies that the interpretation should based on the wider meaning contemplated rather than the narrow dictionary meaning of the words used.

Clarity and accuracy of words in mercantile documents where technical and business terminologies are used assumes greater significance. Business

practices, customs and usages in the business world, implied covenants should all be taken into account in interpreting and drafting documents.

From the above, it is clear that clarity and accuracy are important ingredients of drafting. The aids to clarity and accuracy will depend upon the interpretation of documents, the rules followed by the courts in interpretation in different circumstances and the customs and practices prevalent in the place and between the parties.

LEGAL IMPLICATIONS AND REQUIREMENTS

Drafting of documents is the most important part of legal documentation. Drafting of documents and their interpretation have legal implications. Choice of ambiguous, doubtful words, aims which are incapable of implementation, misinterpretations, prolong litigations, wrongful decisions, denial of justice to the innocent are all implications of inaccurate and dubious drafting. A document that does not convey an appropriate meaning, doubtful and incoherent in draft will lead to prolong litigation, waste of time and money. Non adherence to the drafting principles stated above can cause irreparable damage to innocent persons. In cogent drafting defeats the very objective of the document resulting in pain and misery to the parties. All these legal implications can be avoided by following the principles of drafting which we have discussed above.

GENERAL PRINCIPLES OF CONVEYANCING

Conveyance means the action of conveying. The word Conveyancing is of English origin. It simply means land transfer inter vivos. Sec.205 of the Law of Property Act 1925 defines "Conveyance also as including mortgage, Charge, lease, assent and release …but not Will. Sec.2 (10) of the Indian Stamp Act 1899 defines Conveyancing as including a sale and every instrument by which property moveable or immovable is transferred. Conveyance is a transfer within the meaning of Sec.5 of the Transfer of Property Act 1882.

In England in most ancient times a corporeal hereditament which means land in actual possession was transferred by the method of '**Feoffment**' .For this all that was necessary was appropriate words to denote the quality of the estate intended to be transferred followed by a ceremony for delivery of possession. This was

known as the Common law of Conveyance. This mode of Conveyance was later substituted by "Lease and Release" mode which became popular because of the secrecy involved in the transfer. All these modes of conveyance till the modern times did not require writing or writing was only optional. The Conveyance of the Land Act 1854, is the first authority on the form and several clauses which are there in the Modern law of Conveyance.

The word Conveyance therefore means the act of Conveyancing or transferring property both movable and immovable as per the law, convention or custom of the parties. While conveyancing had its origin in England, the concept of Conveyance as practiced in India differed from that in England. In England the English Common Law recognized three types of estates, viz. estate in fee simple, estate in fee tail and estate for life. While the first type represented complete ownership, the second was of limited character, limited to lineal descendents of the grantee and the third was mere right of enjoyment. However Conveyancing in India is mostly confined to substantive law and personal law of parties.

BASIC REQUIREMENTS OF DEEDS OF TRANSFER

A deed is a document is writing, written on paper or parchment in any form, viz. printed, photographed or typed evidencing Conveyance of title by one party to another. So the word deed has not been defined, the above definition nearly conveys the meaning of deed. A conveyance of property is therefore made by means of a deed of transfer. Every deed begins with the names of parties and ends with execution and attestation clauses. The following are the different components of a deed of transfer.

a) **Description of Deed**: This is how a deed is commenced. THIS DEED OF GIFT, THIS DEED OF EXCHANGE - to be written in Capital letters. This portion of the deed indicates to the reader the nature of the deed and indicates its contents.

b) **Date on which it is executed**: "This Deed of Sale made on 17th day of January 2006". It is the date of execution of the deed. This date is important and material for the purpose of limitation, mutation, and registration and passing of title. When there are several parties the date of

execution by each is material. Where date is not given, oral evidence will be admissible to prove the date of execution.

c) **Place of execution:** The place of execution indicates the territorial jurisdiction and legal jurisdiction of the document. It also enables the authorities to ascertain the stamp duty.

d) **Parties to the Deed**: All proper parties to a deed including inter-parties should be described in the deed. This is because only parties to a contract can take benefits under the contract. The transferor will come first followed by the transferee. The name of the party will be followed by his surname, address and then followed by description such as son of, wife of etc. The profession of the party will come next, in case of artificial persons the statue under which they are incorporated like say Companies Act, Trust Act and in case of partnership the partnership Act. In case of Government - the persons authorized under Art. 229 (1) of the Constitution of India to be stated and the transfer shall be made on behalf of the Governor or President of India.

THIS DEED OF SALE made this ……….day of ………..Between AB of, etc (herein after called the vendor which term shall include his heirs, executors, assigns, liquidators, successors etc.) of the one part and CD of etc. (herein after called the Purchaser which term shall include …….) of the other part.

It is always important to include the heirs, assigns, and liquidator etc to make the parties fully binding and safe guard the interest.

e) **Recitals:** Recitals are short history of the property up to its vesting with the transferor. They are narrative recitals which narrate the interest and title of the person in chronological order and introductory recitals which show the motive behind the execution of the deed. **A recital is the cornerstone of conveyance.** It acts as a warranty of title.

f) **Habendum**: In this part of the deed the interest of the purchaser is stated. "TO HAVE AND TO HOLD" is used but these are not essential for effecting the transfer. This clause is mostly superfluous and has its origin in England where there used to be gratuitous transfer in which the transferee was not the beneficial owner and the property continued to vest in the transferor as a trustee.

g) **Covenants:** A Covenant is an agreement by seal, whereby one or more parties to the deed stipulate certain conditions express or implied. Covenants as to title implied in Sales under Sec.55 (2), Covenants as to mortgages under Sec.65 and Covenants for quite enjoyment under Sec.40 of the Transfer of Property Act 1882 are all instances of statutory covenants running with the land. Covenants may include undertakings also.

h) **Testimonium:** This is that part of the deed which states that the parties have signed the deed. This is necessary for the proper execution of the deed. Attestation and sealing is necessary in case of companies. Attestation is necessary for gift, mortgage, lease and Will. The executant should read the deed before signing. If he cannot, then it should be read over and explained to him by a competent person. The fact of explaining should be endorsed on the deed itself. Usually the testimonium clause should be as under:

   "In witness whereof, parties hereto have hereunto set their respective hands and seals the date and the year first above written"

i) **Testatum**: This is the witnessing clause. This clause says "the deed witnesseth" Address of each witness must be written under each signature. This clause refers to the introductory recitals and consideration if any and recites the acknowledgement of receipt. Consideration is the most important aspect of the deed and is necessary for determining the stamp duty. The Consideration is acknowledged by the transferor in the deed itself. These all form part of the testatum.

j) **Operative words:** These differ in case of different kinds of deeds of transfer. In case of sale, the operative words used as are necessary to pass the estate of the vendor to the purchaser.

k) **Parcels:** It means the description of property following the operative words. Every transfer implies transfer of all legal incidents. If not it should be specifically stated in this part. For example if it is transfer of a house, transfer of garden butting the house should be specifically mentioned. All boundaries are to be given. The words normally used in this part are tenements, herditaments, land, water etc.

l) **Exceptions and Reservations**: The exceptions and Reservations should normally be not stated in case of transfers. It is possible to state any exception or Reservation if it is not expressly prohibited by law. It should also not be repugnant or contrary or uncertain. For example a sale of a house without land is void. Sec.8 of the transfer of Property Act provides for transfer of entire interest in the Property. Sec.10 of the said Act prohibits restraining alienation except in case of a lease. However, there are cases where exception and Reservation can be expressly made in the document. For example a seller of a land may reserve full and free right of way and passage for all times to come over the land which is connected to the property sold. Similarly the right to draw water from a well which falls within the property sold may be excluded from the Conveyance. But the point to be kept in mind in drafting this clause is that nothing which is against the spirit of law can be provided in the document.

m) **Execution**: Execution is signing of the document. In cases of execution by illiterates or blind persons or purdanashin lady care must be exercised. The person entrusted with the work must ensure that the contents and effects thereof are truly and correctly read over and explained to the executant and must be understood by the executant. In case of a Company or Government or where a person is executing the document on behalf of any artificial person, the authority for execution should also be annexed to the document. In case there is any map or plan or any other annexure to the document, it must also be executed. Execution is proved by calling upon witnesses in terms of Sec.68 of the Indian Evidence Act.

n) **Attestation:** Attestation of a document is a mere formality. But this is necessary in certain cases. Example: Mortgage (Sec.59 T.P. Act) Gift (Sec.124 of the T.P.Act) and Will (Sec.63 of Indian Succession Act.) In these cases if the document is not attested by witness it will become inoperative. The attesting person must do so with full and complete knowledge of the entire transaction and on his own volition with any external influence.

o) **Schedules:** All Schedules mentioned in the document should be annexed to the document, if not the document will remain incomplete.

ENDORSEMENT AND SUPPLEMENT DEEDS

Endorsement means to sign on the face or back of the instrument or document. This is particularly applicable to Negotiable instruments under the Negotiable Instruments Act 1881. Endorsement is normally done on Cheques, Promissory Notes, and Bills of Exchange for the purpose of Negotiability. Endorsement of documents is done to either alter the scope or application of the document or acknowledge any receipt or for any other similar purpose. If the document is registered the Registrar makes an endorsement on the document to the effect that it has been registered. Therefore endorsement is a concept that is more applicable to negotiable instruments. As regards endorsement of documents, it helps to put new facts in to the document or alter an existing statement in the document. This can be anything like title to the document, the name in the document or any other detail.

Supplement deed is an additional deed where the parties intend to make changes in the terms and conditions of the original document. If these alterations are of a minor nature which can be incorporated in the document itself, then endorsement of the document will be sufficient. However, if the terms of the document are to be altered substantially then a separate supplement deed between the same parties with reference to the same transaction can be executed. Supplement deed is possible only where there is a original deed between the parties and the parties by mutual consent agree to alter the terms of the original deed.

All endorsement and supplement deed should be stamped as per the tenor of the document and the contents thereof. For example if the endorsement is a receipt then it should be stamped appropriately. If it is an agreement by way of a supplement deed, the stamp duty applicable for agreements should be paid.

Review Questions:

1. State the important rules of drafting.
2. What are the legal implications of drafting of documents? State the degree of care necessary in this regard.
3. Define 'Drafting' and 'Conveyancing' and distinguish them.

4. What are the aids which help to clearly understand a document?
5. Which is the most important part of a deed? Explain its components and significance.
6. Write short notes on: Exceptions and Reservation.
7. When endorsement and supplement are necessary? Explain.
8. State the significance of the Recitals clause in a document.

* * *

UNIT – 2

DRAFTING OF ORDERS AND CONTRACTS

I. DRAFTING OF ORDERS

The relationship between the Employer and Employee in business parlance is a very important relationship and so any document that binds this relationship has to be drafted with care and caution. This relationship not only stems from the employer-employee concept but is also derived from various statues which govern this relationship. These statues which include a number of labour laws like the Industrial Disputes Act, 1947, the Workmen Compensation Act 1923, Employment (Standing orders) Act 1946 provide for certain rules to be adhered to by the Employer. These statues apart from protecting the interest of the employees-vis-à-vis employer also lay down certain regulations to be followed by both the employer and employee.

Appointment Orders

An order of appointment is the first step in creation of employer-employee relationship. The order of appointment is made by the **appointing authority.** The person issuing the appointment order should be the competent authority in the organization and must be at least two stages above the category for which the appointment is made. The order of appointment shall indicate the category for which the appointment is made, the duration of the appointment if it is a temporary appointment, the period for which the employee will be on probation if any, the terms and conditions of appointment including the compensation package etc. It should also where the rules provide indicate the disciplinary authority and appellate authority when penalties are imposed. A specimen of an appointment order is given in **Annexure I.**

Suspension Orders

An order of suspension of an employee is merely an executive action initiated against the employee for any misconduct committed by the employee in the course of employment. It may also be resorted to where the employee is involved in any criminal offence not necessarily connected with the employment. The intention is to keep the employee away from the precincts of employment so that his presence does not influence the enquiry into the

misconduct. The enquiry should be completed as expeditiously as possible after suspension.

The order of suspension is normally issued by the appointing authority or the disciplinary authority as the case may be. The employee will be paid subsistence allowance during the period of suspension as per the law governing the employee and the rules of the organization. A specimen of suspension order is given in **Annexure II.**

Order of Dismissal and Discharge

Dismissal and Discharge of an employee are extreme penal actions initiated against the employee for terminating his service. This is normally done in cases where the employee is found guilty on conclusion of disciplinary proceedings initiated against the employee. While the order of dismissal terminates the services of the employee without his terminal benefits and is imposed as a penalty, an order of discharge is termination of the services of the employee without disgrace. While dismissal of an employee disqualifies him from future employment, discharge does not act as a deterrent from acquiring future employment. The order of dismissal or discharge should be issued only after conclusion of disciplinary proceedings conducted as per rules following the provisions of natural justice. Specimen orders of dismissal and discharge are given in **Annexure III** and **Annexure IV**.

Charge Sheets

Charge sheet is a documents issued by an employer to a delinquent employee. Charge sheet should be carefully drafted by the employer listing out the specific charges against the employee in clear and unambiguous terms. Charge sheet is issued by the appointing authority or in some organizations by the Disciplinary authority. While no specific form of charge sheet is prescribed, it should encompass the following aspect in it.

(a) All charges stated in the charge sheet should be clear and not vague. The offence mentioned should be clearly stated with reference particular provision of law which is violated.

(b) If there is more than one charge, each charge should be separately be stated.

(c) If the employee has committed any misconduct, the action or words or offence committed by him shall be explicitly stated.

(d) The language used to describe the charge should be simple, concise and easily understandable.

(e) The delinquent employee should be given sufficient time to reply to the charge sheet.

On receipt of the reply from the employee to the charge sheet or if no reply is received within a reasonable time, the employer can then proceed against the employee as per rules. If the offence is of a minor nature, then the disciplinary authority can straight away impose a minor penalty. On the other hand if the offence is a major one warranting an enquiry, the disciplinary authority should appoint an enquiry officer to conduct the enquiry and based on his findings proceed against the employee. It must be ensured that the enquiry officer follows the provisions of natural justice while conducting the enquiry. On completion of the enquiry, the disciplinary authority imposes a penalty including an order of dismissal and discharge. If the employee is not found guilty, he may be exonerated.

Apprenticeship Agreements

Apprentice means a person who undergoes training under a contract of apprenticeship. The contract need not be in writing but sometimes written contracts are made. The apprentice undergoes training under the supervision of a person qualified in the designated trade. All contracts entered into shall be in conformity with the Apprenticeship Act 1961. The following are the salient features of a contract of apprenticeship.

1) The contract of apprenticeship is for a predetermined period and the person employed as an apprentice shall work under the qualified person as per his guidance.

2) The master shall throughout the stipulated period impart training to the apprentice in the designated trade as carried on by him.

3) The apprentice shall obey all lawful commands of the master in the designated trade and learn the trade diligently and not commit any act of indiscipline or misconduct during the period of training.

4) The master shall pay the apprentice each week or month a specified sum of money as allowance.

5) The master shall give all facilities to the apprentice and provide him with tools and implements to work as are necessary for the learning of the trade and impart suitable instructions in the particular trade.

6) The master shall also provide suitable board and lodging if previously agreed upon and also medical attendance wherever necessary.

7) The apprentice shall discharge his duties faithfully and handle the tools and implements cautiously and not cause any damage or spoil any property or divulge any trade secrets.

8) The apprentice shall not work anywhere else during the subsistence of the period of apprenticeship and shall not communicate unlawfully with other similar persons in the trade and cause harm to the master.

9) The master shall reimburse to himself a part of the allowance for any loss or damage caused to him by the apprentice in the course of the training.

10) The contract of apprenticeship can be terminated by the master after giving notice to the apprentice in case of negligence, gross misconduct, dereliction of duty etc.

The above are the important features of a contract of apprenticeship. All these above features have to be incorporated in the Deed of Apprenticeship entered into between the master and the apprentice.

ANNEXURE I

APPOINTMENT ORDER

Ref. No. Place:

Date:

To

Dear Sir,

With reference to your application dated ____________ and subsequent interview, the undersigned is pleased to inform you that you have been selected for appointment as ______________ on the following terms and conditions.

1) You will be on probation for a period of six months. The probation period may be extended depending upon your performance.

2) If your performance is not satisfactory during the probation period including extension, your services will be terminated forthwith and you will not be entitled to any compensation for the same.

3) On successful completion of probation you may be confirmed in your appointment as per the rules.

4) You will be entitled to a remuneration of Rs.__________ per month as basic wage/salary. You will be also entitled to payment of Dearness Allowance, House Rent allowance etc as per rules.

5) You will also be entitled to leave/holidays as the rules of the Company subject to the provisions of any law as applicable.

6) You will be liable to be transferred to any branch or office of the Company within India as the exigencies may warrant.

7) The appointment can be terminated by ____________ months notice by either side.

8) You will have to report for duty on __________ failing which it will be construed that you are not interested in the appointment and the order of appointment shall stand cancelled.

9) Please return the duplicate copy of this letter duly signed in token of your have accepted the appointment subject to the above terms and conditions and return the same for our record on or before __________

Yours faithfully,

Signature

Designation

(APPOINTING AUTHORITY)

ANNEXURE II

SUSPENSION ORDER

Ref. No.

Place:

Date:

To

It has been decided by the undersigned to initiate disciplinary proceedings against you for the following alleged misconduct committed by you.

Description of misconduct.

Pending completion of Disciplinary proceedings, it is decided to place you under suspension with immediate effect in terms of ____________ rule of conduct of the Company.

During the period of suspension you will be paid subsistence allowance in accordance with the rules.

You will also make yourself available for enquiry/disciplinary proceedings whenever required to do so.

Signature
Name and Designation
(DISCIPLINARY AUTHORITY)

ANNEXURE III

ORDER OF DISMISSAL

Ref. No. Place:

Date:

To

Dear Sir,

We invite a reference to our letter no. Dated wherein we have called for an explanation from you for certain acts of alleged misconduct committed by you. Your reply was received vide your letter No. Dated As the explanation submitted by you was not satisfactory, it was decided to constitute an enquiry into the charges which was intimated to you vide our letter no. Dated

2. The enquiry officer has conducted the enquiry into the charges and has submitted his report thereon. A copy of the report is enclosed.

3. The enquiry officer in his report has found you guilty of Charges Nos. ________ which are misconducts of grave and serious nature.

4. I have carefully gone through the report of the enquiry officer and I agree with his findings given in para ________ above.

5. After taking into account the report of the enquiry officer, your service record and grave nature of the charges which have been proved, it has been decided that you should be dismissed from service with immediate effect.

6. You can collect your dues if any from the office on any working day during business hours.

Yours faithfully,

Signature

DISCIPLINARY AUTHORITY

ANNEXURE IV

ORDER OF DISCHARGE

Ref. No. Place:

Date:

To

Dear Sir,

We regret to say that your services are no longer required by us and that your appointment will stand terminated with effect from ____________

2. The dues if any may be collected from the office during business hours on any working day.

Yours faithfully,

Signature :

Designation

(DISCIPLINARY AUTHORITY)

DRAFTING OF CONTRACTS

Every organization comes across a plethora of contracts in the ordinary course of business. It is necessary for all persons connected with the management of the company to be conversant with the ingredients of a contract. There is no specific form for a contract. But all contracts whatever may be they for, must confirm to the provisions of the Indian Contract Act 1872. Therefore every contract has to be carefully drafted in accordance with the provisions of

law and the subject matter and the performance part of the contract. The salient aspects to be taken into account in drafting a contract are discussed below:

a) **Parties to the Contract**: The parties to the Contract should be clearly defined. The name of the party, father or spouse name, address of residence, marital status and in case of an artificial person, the persons representing them and the official address of correspondence is to be given.

b) **Nature of Contract**: In the first or introductory part of the document, the nature of contract viz. sales contract or marriage contract or building contract to be given to avoid any future doubt and also make the parties and other persons aware of the same.

c) **Passing of Title and Risk**: The Contract should state exactly when the title will pass to the other party and also the time of passing of the risks associated with the contract. This is necessary to ascertain the person responsible for payment of damages or loss at any particular point of time.

d) **Taxes, duties, Insurance etc**: Responsibility for payment of taxes, cess, duties and insurance in case of transfer of goods should be clearly explained in the document.

e) **Payment of Consideration**: The mode of payment of consideration by the parties to the contract and in case of international contracts the instruments by which consideration will be paid (for ex. Letter of credit) has to be specifically stated.

f) **Settlement of Disputes**: The document shall also state clearly modalities for settlement of disputes if any under the contract. A provision for settlement of disputes through arbitration is usually included in a Contract.

g) **Contracts with Companies**: In case of contract with companies, the descriptive portion of the contract shall state the persons representing the company and the authority they have to execute the contract. The contract document shall also state the relevant provisions of law and the contents of the Memorandum and articles of the company.

AGREEMENTS TO SELL/PURCHASE

An agreement of sale/purchase is one of the common types of Contract. While all the essential features of a contract cited above are also common and applicable to a Contract of sale, the following aspects are to be particularly noted in an agreement of sale/purchase.

a) **Abstract on title**: The first and foremost aspect in drafting a contract is to study the title deeds and prepare an abstract of the title deeds. This is particularly necessary in a sales or purchase contract. Because a title can be absolute or qualified or mere possessory in nature and the extent of right the purchaser will get on the contract is also dependent on it. An abstract of title starts from the document which is the root of the vendor's title to the property and follows it up with all transfers by act of parties or operation of law till the current seller. The title should be complete, absolute and marketable.

b) **Searches and enquiries**: For any contract the purchaser has to be absolutely vigilant and careful. As the common saying (Caveat emptor- buyer beware) goes, every purchaser has to be careful. He shall make through search for any encumbrance on the property and make all reasonable enquiries as are necessary for him to ascertain the nature of title to the property. Enquiry shall also be made of the persons in occupation of the property and if the person is a tenant, then the terms and conditions and rights of tenancy shall also be ascertained. If the purchaser is not careful and does not make a search or enquiry, he will be guilty of gross negligence.

c) **Production of title deeds**: It is obligatory on the part of the vendor to produce all title deeds evidencing his title till the property came to his possession. This will include all certificates of births or deaths of the predecessors in title. The title shall be good, marketable and free from any reasonable doubt.

d) **Subject matter:** The Transfer of Property Act 1882 is the basic legislation on which transfer of property is made. The agreement of sale/purchase is governed by the provisions of Sec.54 of the Transfer of Property Act. The property which is the subject matter of the agreement shall be clearly described. If it is subject to changes, easements, encumbrances, covenants etc. the same should be clearly stated so that the purchaser is clear about the nature of property he is purchasing.

e) **Execution and Registration:** Execution and Registration are two things that are essential to complete the transaction. Execution and payment of consideration are reciprocal part of a sale transaction. While the seller can sue for non payment even after execution, it is always followed in practice that execution is done only after payment of consideration. Execution is done according to the English practice and the text is explained to the executant where he is not conversant with the language. All documents must be attested by independent witnesses.

f) **Possession of Property**: Possession of property is taken simultaneously with execution of the documents. The law stipulates that possession must be given immediately or as provided in the document.

All the above aspects and provisions should be incorporated in an agreement of sale/purchase. In addition, it must always be kept in mind that any agreement of sale/purchase should confirm to the provisions of the Transfer of Property Act and the parties to the transaction namely the seller and purchaser are subject to the rights, duties and obligations as prescribed in the Transfer of Property Act. A specimen agreement of sale is give in **Annexure I**

Dealership Contracts

A Contract of dealership is normally entered into between a manufacturer and a dealer either for whole sale dealing or for retail transactions. A manufacturer appoints dealers for selling and distribution of his products. This is so because he cannot carry on business of marketing on his own as he may not have the network of marketing arrangement. In such cases he appoints dealers to carry on the marketing work. Similarly the dealers do not have the capital and the ability to manufacture goods themselves. The contracts entered into with the dealers for marketing or sale of goods is called a Dealership contract. A Contract of dealership is also governed by the Indian Contract Act 1872. All ingredients of a contract, namely, parties, consideration, legality etc are all similar as in any other contract. The additional features to be included in a contract of this nature are the commercial nature and the commercial terms agreed between the parties as known in business parlance. This is done to avoid any ambiguity or dispute in future and spoil the business relationship. The important to be kept in mind is that the terms of the contract shall not result in

any Restrictive trade practice as stated in Competition Act 2002. This means that any contract proposed to be entered between a manufacturer and a dealer shall not be restrictive in nature. A specimen form of a dealership contract is given in **Annexure II**

Building Contracts

Building contracts are similar to Dealership contracts. They are also governed by the Indian Contract Act 1872. All the ingredients of the contract as stated above are also applicable to building contracts. A specimen of building contracts is given in **Annexure III**

Agency Contracts

These are special types of contracts under the Indian Contract Act 1872. In a contract of Agency, one person enters into a contract with another not directly but through an authorized person acting as agent of the first mentioned person. The person who enters into the contract is called the Agent and the person on whose behalf he does so is called the principal. In this type of contract which is mostly done in business where the Principal is not able to do business directly by himself, appoints some one as his authorized agent to do business. In this process the agent enters into contract on behalf of the Principal. Such types of contracts are called agency contracts. The following important aspects have to be kept in mind in a contract of agency.

- The agent who enters into Contract should have the authority of the Principal. It means that all the acts of the agent should bind the Principal also.
- The authority for the agent may be express authority through any written document or an authority by implication.
- The Principal is liable for all the acts of the Agent unless the agent exceeds his authority in which case he is personally liable.
- The agent is authorized to do all such things that are incidental and necessary for carrying out the directions of the Principal.
- While a contract of agency cannot be assigned as such unless the nature of the business so warrants and is done with the full knowledge of the Principal.

- There is also a special type of agent called Del credere agent who not only acts as an agent but also guarantee the performance of the Contract by the buyer.
- While consideration is not a necessity for such types of contracts, there may be clauses in the Contract which provide for remuneration of the agent for his acts.

A specimen Contract of Agency is given in **Annexure IV**

COLLABORATION AGREEMENTS

These are agreements of Co-operation entered into between two parties for sharing their expertise, technology and help in the training of technical personnel of one party by the other. The Collaboration more pertinently refers to the Co-operation between two parties' one in India and the other abroad. These are known in business parlance as Foreign Collaboration agreements. The collaboration can be technical collaboration or financial collaboration in any field where collaboration is permissible as per Indian laws.

Indian Government has laid down guidelines for entering into these Collaboration agreements. So any agreement drawn between the parties should apart from is agreement with the Indian Contract Act 1872, should also confirm to the guidelines of the Government in this regard. All agreements of Collaboration entered into by the parties is subject to approval of the Government of India.

It is necessary to have knowledge of these guidelines to ensure that the agreements are in accordance with these guidelines. Some of the important guidelines are given below:

- Investment in Foreign Collaboration agreements through equity participation should be done only in cash through normal banking channels.
- If the Indian party is required to make a lump-sum payment it should be done in three equal installments; one at the time of approval of the agreement; one at the time of transfer of technical documents and the third at the time of commencement of commercial production.

- While Royalty is payable to the foreign collaborator varying from 3 to 5 percent depending upon the nature and extent of technology involved.
- The total duration of the agreement can be from eight to ten years. It is normal practice of the Government to sanction five years duration at a time.
- All payments to foreign collaborators shall be at the prevailing market rates.
- There should not be any restriction on procurement of capital goods, components, spares etc.
- The number, duration and terms of service of technicians to be engaged by either party should be as per the directions of the Reserve Bank of India.
- All consultancy requirements shall be full filled only by an Indian consulting agency.
- All collaboration agreements shall be subject to Indian laws only.
- There should not be any restriction on use of Indian brand names. Foreign brand names can be used for products exported out of India.

A specimen of agreement of Collaboration is given in **Annexure V**

ARBITRATION AGREEMENTS

Arbitration agreements are agreements entered into under the provisions of the Arbitration and Conciliation Act 1996. An arbitration agreement is an agreement between two parties to a contract or between two parties to a dispute that has arisen between them either in a contract or otherwise, to settle the same at the behest of a third party. The third party who intervenes to settle the dispute is known as the arbitrator and the decision of the arbitrator is called the award.

The essential features of an arbitration agreement are (a) the existence of a dispute between two parties (b) Its submission for settlement by a third party (c) the third party gives his reasoned judgment based on the circumstances and the facts of the matter. It follows therefore that where a dispute arises between

two parties, they have to agree in writing as per the provisions of the Arbitration and Conciliation Act 1996 to settle the dispute through arbitration.

Arbitration is a special law enacted for expeditious settlement of disputes arising out of contractual obligations. In cases where disputes arise out commercial or contractual obligations, civil litigation will destroy the very essence of quick settlement and result in hardship to the parties. Arbitration is an easy way of settling disputes by reputed persons without following all the procedural modalities of a court settlement. As the arbitrator is a respected and renowned person the parties easily agree to abide by his judgment. The award of the arbitrator should be certain, consistent, fair, complete and enforceable.

The contracts entered into by parties usually contain a clause to refer disputes if any arising out of the contract to a third party for arbitration. This clause itself is sufficient to refer disputes to arbitration. The arbitrator and the terms are agreed by the parties in writing at the time of referring the dispute. A specimen arbitration agreement is given in **Annexure VI**

ANNEXURE I

AGREEMENT OF SALE OF HOUSE PROPERTY

This AGREEMENT OF SALE made this …………day of ……..in the year of ……… between Sri ……… son of ………… residing at ……………..hereinafter called the Vendor (which expression shall unless repugnant to the context include the vendors, their successors and assigns) of the first part AND Sri ……… son of ……….. residing at ……………hereinafter called the Purchaser (which expression shall unless repugnant to the context include the purchaser, his successors and assigns) of the second part

WHEREAS the vendor is the sole and absolute owner of the property more fully described in the Schedule hereunder;

WHEREAS it is agreed that the vendor shall sell and the purchaser shall purchase the said property for a sum of Rs. …………..(Rupees……………) free of all encumbrances.

NOW THIS AGREEMENT OF SALE WITNESSETH AS UNDER:

1) The vendor agrees to sell and the purchaser agrees to purchase the entire house property comprised in the premises No…………..more

particularly described in the Schedule hereunder written and referred to as the said property free from all encumbrances, attachments, charges, claims and demands at or for the price of Rs.......... (Rupees..................) subject to the terms and conditions herein contained.

2) The purchaser has this day paid to the Vendor the sum of Rs.........(Rupees ....) as and by way of earnest money and the balance of the purchase money amounting to Rs. ....(Rupees ....) shall be paid at the time of completion of the purchase.

3) The vendor agrees that he shall deliver vacant possession of the property to the purchaser before registration of the deed of conveyance.

4) The vendor shall deliver to the purchaser all title deeds and other papers including the sanctioned building plans, municipal bills relating to the property for scrutiny of the purchaser and the opinion of the purchaser's advocate shall be final and conclusive. The purchaser shall intimate the vendor about the approval of the title.

5) If a good marketable title is made out and the property is found to be free from all encumbrances, attachments and charges and other claims and demands and not affected by any notice, scheme of acquisition or requisition, the vendor will execute a proper conveyance in favour of the purchaser or his nominees or assignees.

6) The vendor shall deliver peaceful vacant possession of the property which is in his occupation and the rest by attornment of tenancy to the purchaser at the time of completion of purchase.

7) If a good and marketable title is not made out or the property is found to be subject to any encumbrances, attachments or charges or other claims or demands, the purchaser shall be at liberty to rescind this agreement and the vendor shall in that event and on demand by the purchaser refund the said earnest money and shall pay to the purchaser a sum of Rs. ....(Rupees.......) only as settled cost of searches and investigation of vendor's title and of this agreement as between party and party.

8) If the vendor fails or neglects to complete the sale after the title being made out as aforesaid or otherwise to carry out any one or more of the obligations on his part as herein provided or otherwise required by law,

the purchaser will be at liberty to enforce specific performance of the agreement by institution of legal proceedings or at his option may sue the vendor for recovery of earnest money with interest, cost and other relief's.

9) If on the title being found good and marketable, the purchaser fails to complete the purchase within the time aforesaid, the earnest money shall be forfeited to the vendor or the vendor may at his option enforce specific performance of this agreement by the purchaser and the purchaser will also be liable to pay the costs and expenses of proceedings for specific performance.

The Schedule above referred to:

....

....

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals on the day, month and year first above written.

SIGNED, SEALED AND DELIVERED by the within named vendors in the presence of :

Witnesses: 1)

2)

ANNEXURE II

DEALERSHIP CONTRACT

AGREEMENT BETWEEN MANUFACTURER AND WHOLESALE DEALER

AN AGREEMENT made the ....day of ....BETWEEN AB of etc. (hereinafter called the "MANUFACTURER") of the one part, and CD of etc. (hereinafter called the "DEALER") of the other part to the following effect:

1) The manufacturer shall supply and the dealer shall sell the whole of the seller's existing stock of …….. and other goods to be manufactured hereafter without any exception or reservation thereof.

2) The goods to be supplied shall be sold by the dealer strictly at listed prices to retailers for which he will be entitled to a commission of ………..% on all listed prices exclusive of all railway freight.

3) In case any portion of the goods shall remain unsold for over ……..months after supply and delivery, the dealer shall return the stock to the manufacturer.

4) The dealer guarantees a minimum sale of the value of Rs………..per year. In case the same falls short for two or more consecutive years or more this agreement may be rescinded at the option of either party.

5) Subject to what is stated in Paragraph 4 hereof, this agreement shall remain in force for a period of five years subject to the option of either party as provided therein and also subject to the conditions that the dealer shall not, during the currency of this agreement sell or encourage the sale of identical or similar products of any other manufacturer.

6) In the event of a dispute between the parties with reference to any matter which is within the purview of this agreement, the parties hereby agree that they shall refer the dispute to……………or failing him to …….. for arbitration and the decision of the arbitrator shall be final and binding.

IN WITNESS THEREOF the parties aforementioned have signed this agreement in the presence of :

SCHEDULE OF PRODUCTS

1) ………………………………

2)………………………………

Manufacturer **Dealer**

Witnesses:

1)

2)

ANNEXURE III

SPECIMEN OF BUILDING CONTRACT

THIS AGREEMENT mad this ....day of ....2006 between XYZ LTD a Company incorporated under the Companies Act 1956 and having its Registered Office at.......................acting through.................its Company Secretary (hereinafter called the 'Builder') which term shall unless repugnant to the context shall include its legal representatives and assigns of the one part AND Sri............son of .... residing at ....(hereinafter called the 'Owner') which term shall unless repugnant to the context shall include his legal heirs, executors, administrators and assigns of the other part.

WHEREAS THE OWNER has a plot of land measuring ....sq mts situated at .... more specifically referred to in the Schedule hereunder duly registered in the name of the Owner with the rights, title and interest absolutely vesting in him;

AND WHEREAS the Owner has requested the builder to build a house on the said piece of land as per the design and plan approved by the Municipal Corporation of the area;

AND WHEREAS the builder has agreed to build the said house

NOW THIS AGREEMENT WITNESSETH AS UNDER:

1) The said builder shall build the house within a period of four months from the date of execution of this agreement on the plot of land belonging to the owner and more specifically referred in the Schedule hereunder.

2) The said owner shall arrange for and supply the materials and the said builder shall construct and build and shall completely finish the house for the owner with his own labour on the plot of land described in the Schedule hereunder.

3) The builder shall build the house according to the plan approved by the Municipal Corporation and according to specifications, elevations and sections indicated in the building plan and according to the directions of the owner or his authorized representative, if any, given from time to time without any deviation from the plan or specification or elevation or sections except with the written consent of the owner and if required by

the owner the builder shall at his own cost and expenses dismantle the same and complete the work according to the plan, specifications, elevations and sections therein.

4) The said builder shall build the house and completely finish and make the said house habitable on or before the ....day of ....2006 unless prevented by any labour strike, fire, accident, earthquake, mob violence, attack by enemies or any other major disturbances and in default thereof he shall be liable for and pay the owner damages at the rate of Rs.........(Rupees...............) per day for such breach of contract for so long as the said house shall remain unfinished and inhabitable.

5) The said builder shall build the said house under his direct supervision and in the best workman like manner and shall not on any account whatsoever shall employ a sub-builder for building and completing any portion thereof except with the written consent of the owner, which the owner may withhold without assigning any reasons.

6) The owner shall pay to the said builder on the.......day of each month against his running bills 90% of such sums as he claims or entitled to on the progress of the work and according to the approved rates and the final payment shall be made after completion of the work and scrutiny of all the bills.

7) All moneys which the said builder shall be liable to pay to the owner on account of breach of this contract or on any other account shall be deducted by the said owner from and set off against any money or moneys which may be due to the said builder on account of the construction of the said house during the process or on completion.

8) Within ....months of the completion of the said house and adjustment of the account the owner shall pay to the builder such balance amount as he may then be entitled to according to the terms of this contract upon scrutiny of all bills.

9) In case the owner requires any deviation from the said plans and specifications and designs or any additional work or any more building or buildings, the builder shall duly execute the same as required by the owner subject to the terms and conditions agreed to by them for the said

deviation, specifications and designs or for any additional work or building as agreed upon by them.

SCHEDULE:

Details of the plot of land on which the house is to be built to be given in the Schedule

IN WITNESS WHEREOF the parties above-mentioned have signed this deed in token of acceptance of the terms thereof:

OWNER BUILDER

WITNESSES:

1)

2)

ANNEXURE IV

SPECIMEN OF AGENCY CONTRACT

AGREEMENT BETWEEN A PRINCIPAL AND A TRAVELLING AGENT

AN AGREEMENT made the ……..day of …………BETWEEN AB of etc. (hereinafter called the 'Principal') of the one part and CD of etc. (hereinafter called the 'Agent') of the other part:

WHEREBY IT IS AGREED AS FOLLOWS:

1) In consideration of good and faithful services to be rendered the said principal hereby appoints the said agent as traveling agent for a period of …..years from the date hereof in the business of the principal on terms hereinafter mentioned.

2) The agent will during the said period shall diligently and faithfully serve the Principal in such capacity as aforesaid and will all times obey and carry out the instructions of the Principal in regard to such service and all affairs ancillary or incidental thereto.

3) The agent will travel in the districts of etc., and in such other districts as the principal may at any time require for introducing new customers and pushing the sales of the Principal's business or trade.

4) The agent shall use his utmost endeavours to secure orders for the Principal's goods and shall also call at regular intervals and report to the future and present customers of the principal and also endeavour his best to secure orders for such goods to establish a market and pass on all such orders to the principal without any delay.

5) The agent shall at all times keep full and accurate accounts of all orders secured by him and of all other transactions and things done by him in connection with the said business and forward the same to the principal specifying the persons or firms on whom he has called and the orders he has secured and the moneys collected and spent by him.

6) As consideration for the services to be rendered the Principal shall pay the Agent a salary of Rs................per annum by monthly installments of Rs....each, the first such installment to be paid on the.........day of ......next and will also pay to him a commission on the moneys actually received by the Principal in respect of all Original orders obtained by the Agent, at the rate of ......%.

7) In addition to what is stated in Clause (6) above, the principal shall also pay to the agent a fixed sum of Rs..........per month to cover all expenses of traveling, board, lodging or otherwise or the actual expenses incurred by him in connection with the business of the Principal.

8) Either Party may at any time determine this agreement in writing by giving to the other .... Calendar months notice in writing provided the principal may in the event of breach of any clause of this agreement determine the same without notice or payment in lieu of notice.

9) After the determination of this agreement, the agent shall not for ......years directly or indirectly carry on any similar business or trade or interested or concerned in any way in any business similar to that carried

on by the Principal at the date of such determination and shall not solicit the customers of the Principal for orders.

IN WITNESS WHEREOF SIGNED IN THE PRESENCE OF:

PINCIPAL AGENT

WITNESSES:

1.

2.

ANNEXURE V

SPECIMEN COLLABORATION AGREEMENT:

THIS AGREEMENT executed this ………..day of ……………between M/s …………………..a Foreign Company incorporated in Japan and having its Registered Office at ………………hereinafter called the JAPANESE COMPANY of the One Part; AND

M/s ……………….a company incorporated in India having its Registered Office at ……………hereinafter called the INDIAN COMPANY of the Other part:

WHEREAS the Indian has been incorporated and having as its objects the manufacture and production of …………………..;

WHEREAS the Indian Company desires to improve further the quality oi commodities manufactured is desirous of procuring the latest techniques and know-how relating to the manufacture of the products;

WHEREAS the Indian Company therefore approached the JAPANES COMPANY who has considerable experience and expertise in the line of manufacture of the Indian Company and requested them to extend the necessary technical assistance;

WHEREAS the JAPANESE company has agreed to extend the technical assistance and the requisite business know-how to the Indian Company to improve their business;

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

1) In consideration of the remuneration paid by the Indian Company to the JAPANESE Company as described hereunder, the JAPANESE Company shall supply to the Indian Company:

   i) technical advice and know how for the purpose of improving the existing business of the Indian company.

   ii) impart advice in the furtherance of the business of the Indian Company in matters like purchase of new machinery and installation of new plant.

   iii) provide the service of their technicians to assistant their counterparts in the Indian company in matters of technical improvement to plant and factory.

   iv) train personnel of Indian Company in their factory in Japan and equip them with technical knowledge in operation of plant and factory.

2) For the above technical assistance and supply of business know how to the Indian Company, the Indian Company shall make a lump sum payment of Rs…………..to the Japanese Company in a phased manner as follows:

   i) 40% at the time of approval of this agreement by the Government.

   ii) the balance 60% in three equal installments thereafter after the commencement of production.

3) This agreement shall be in force for a period of 3 years and can be renewed or extended further by mutual agreement for a further period of 3 years at a time.

4) It is not obligatory for the Indian Company to use the foreign brand name.

5) This agreement shall preclude the Indian Company from using their own raw materials and spares and the Indian company shall be free to determine the price of its products.

6) The Companies mutually agree that they will share any information of new techniques and business know how which they respectively come to possess and pass on to the other.

7) The Indian Company shall be free to export its products to any country including Japan without any restriction whatsoever.

8) The Indian Company shall maintain utmost secrecy in connection with any technical data supplied by the Japanese Company and keep all data of any process as strict secret under lock and key.

9) The Indian Company shall not during the subsistence of this agreement refer any technical problem or any matter concerned with its business know how to any other company other than the Japanese Company and shall treat the Japanese Company as its sole advisor all matters of technical importance and business know how.

10) After the termination of this agreement, all data will be returned by the Indian Company to the Japanese Company and shall expressly refrain communicating any information or material received it to any person, Company or anyone whatsoever.

IN WITNESS WHEREOF the parties hereto have signed this agreement on this ………….day of …………..2006 in the presence of :

WITNESSES:

1.

2.

INDIAN COMPANY FOREIGN COMPANY

ANNEXURE VI

SPECIMEN OF ARBITRATION AGREEMENT

AN AGREEMENT made this ....day of ....2006 BETWEEN AB son of etc. of the One part; AND BC son of etc.....of the Other part;

THIS AGREEMENT WITNESSES AS FOLLOWS:

WHEREAS the parties hereto were so long carrying on business as partners under the name and style of .... at .... ;

WHEREAS disputes and differences have now arisen and they are still subsisting between them over the question of accounts, distribution of profits and retirement benefits of the party of the second part;

WHEREAS it has been agreed between them that the disputes if any arising out of the partnership is to be referred to arbitration;

WHEREAS they are now agreeable to refer and submit to the decision of the award of XY son of etc. as the Sole arbitrator;

NOW IT IS hereby agreed between the parties as follows:

1) The arbitrator shall take upon himself and decide all matters of dispute and differences between the parties as aforesaid with regard to the matters of accounts, distribution of profits etc to the party of the second part which are hereby referred to the adjudication and final determination of XY ....as the Sole arbitrator.

2) The arbitrator shall hear the parties, administer oath to witnesses, consider all pleadings and answer thereto all allegations and counter allegations and evidences both oral and documentary placed before him and make public his award in writing on or before ....day of ....unless the time for that purpose is extended by any court of competent jurisdiction.

3) The provisions of the Arbitration and Conciliation Act 1996, so far as consistent herewith shall be deemed to be incorporated herein and all provisions of the said act shall apply to the reference hereunder contemplated.

4) The arbitrator shall not be entitled to proceed ex-parte except in case where either party willfully or wrongfully fail and neglect to attend the proceedings.

5) The parties to this agreement agree that will co-operate and render all co-operation to the arbitrator to enable him to make his award within the stipulated date.

6) The parties also agree that this agreement will not be revoked either by death of either party or for any other cause.

7) The award made by the arbitrator shall be final and binding on the parties and persons claiming under them respectively.

8) The cost of reference and award shall be in the discretion of the arbitrator who may direct to, and by whom and in what manner such cost or any part thereof shall be paid.

Dated this ....day of 2006

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals, the day, month and year first above written.

PARTIES:

WITNESSES:

1.

2.

Review Questions:

1. What is the difference between dismissal and discharge? Draft a specimen order of dismissal.
2. Briefly explain the provisions of a Contract of Apprenticeship.
3. What is a Charge sheet and what are its contents?
4. State the important features of Commercial Contract and the important aspects to be taken note of in drafting a contract.
5. What is the significance of a Collaboration agreement for a Corporate? State the important features of a Collaboration agreement.
6. Draft a Dealership Contract including all the terms and features to be included therein.
7. Draft a specimen of sale of a house property.
8. Draft an arbitration contract. State the important aspects to be kept in mind in drafting such contracts.

* * *

UNIT – 3

DEEDS OF MORTGAGES, CHARGES AND PLEDGES

INTRODUCTION

The concept of Mortgage or rudiments of it was there even in the 19th Century. It was in different form and was known variously in different parts of our country. It was a form of conditional conveyance in those times. The Roman 'fiducia' of those days resembled *Muddata Kriyam* as was known in Madras or *Khatkabala* in Bengal. These forms of conveyances resembled the Roman Hypotheca and later the simple mortgages in India. These were also known as *Adaimana Patram* or *Dhrista Bhandaka*. It was the English Doctrine of Equity of Redemption set the ball rolling for a comprehensive law on Mortgages. The Doctrine of Equity of Redemption, which is jealously guarded by the courts, confers on the mortgagor the right to redeem the property even if the time to redeem has gone by as per the contractual right of the mortgagor. This right of the mortgagor is incorporated in Sec.60 of the Transfer of Property Act 1882. This makes it clear that the equitable right to redeem the mortgage property subsist until the interest of the mortgagor is effectively extinguished by the due process of law.

The law of mortgage is a combined product of common law, equity and statute. The word mortgage which has its origin in two French words 'mort' and 'gage' which in ancient common law was known as a pledge. If the lender enters possession and took the rents and profits it was known as 'living pledge' and in another the lender would appropriate the rent and profits by arrangement and this was known as the 'dead pledge'. *Sec.58 of the transfer of Property Act 1882 defines a mortgage as a transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, existing or future debt or the performance of an acknowledgement which may give rise to a pecuniary liability.* The transfer of property act does not deal with movable property and hence the mortgage of immovable property alone is covered under the act. But the transfer of movable property where possession is not taken as in case of machinery is known as hypothecation and is more common is business borrowings. The person who mortgaged the property is known as the mortgagor and the person to whom the property was mortgaged is known as the mortgagee and the property is known as

mortgaged property. The transfer of property act enunciates following types of mortgages which are in effect in our country.

1. **Simple Mortgage**: Simple mortgage as per Sec.58 (b) of the Transfer of Property Act 1882 is a mortgage where the mortgagor ***without delivering possession*** of the mortgaged property binds himself personally to pay the mortgage money and agrees expressly or otherwise that ***in the event of his failure to pay*** according to the contract, ***the property will be sold*** and the proceeds would utilized for appropriation towards the mortgage money. A Specimen deed of simple Mortgage is give in **Annexure I**
2. **Mortgage by Conditional Sale**: In this type of mortgage the mortgagor ***ostensibly sells the mortgaged property*** subject to the condition that, ***if there is default*** in payment of the mortgage money, the ***sale will become absolute*** or if the mortgage ***money is paid*** within the stipulated date ***the sale will become void*** and the property shall be retransferred to the mortgagor. (Sec.58 ©) A specimen deed of Mortgage by conditional sale is in **Annexure II**
3. **Usufructuary Mortgage**: In a usufructuary mortgage, ***the mortgagor delivers possession*** or binds himself to do so and authorizes the ***mortgagee to retain possession*** until the ***payment of mortgage money*** and to receive rent and profits accruing from the property and ***appropriate the rents and profits*** towards in lieu of interest and payment of mortgage money (Sec.58 (d)) A specimen of English mortgage is in **Annexure III**
4. **English Mortgage**: ***It is a conveyance subject to the right of redemption***. In this type of mortgage the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property to the mortgagee with a proviso that he will retransfer the property to the mortgagor on payment of the mortgage money. (Sec.58 (e)) A specimen of English mortgage is in **Annexure IV**
5. **Mortgage by Deposit of Title Deeds:** It is a mortgage preferred by business and financial institutions and is known in English law as ***equitable mortgage***. It is a oral mortgage where no documentation is involved. Only a ***memorandum of mortgage by deposit of title deeds is prepared***. It does not require registration. Nor does it require transfer of

possession. The title deeds of the property have to be delivered at centres which are notified for the purpose. (Sec.58 (f))

6. **Anamolous Mortgage:** It is a mortgage which may be a combination of the above different types of mortgages or one which may be at variance with the above types.

REQUIREMENTS OF A DEED OF MORTGAGE

A through investigation of title up to 30 years and a through search is the basic requirement for a mortgage as in the case of a sale.

Parties to the Deed: The Mortgagor and the mortgagee are the parties to the deed, mortgagor first and mortgagee thereafter.

Recital: The recital should contain brief history of the property right up to its vesting with the mortgagor. It should also contain the object of the loan, amount of loan and the interest payable thereon.

Operative words: This is a very important clause in the mortgage deed. It describes the property to be mortgaged. It also says as to whether possession will be handed over or not and whether the rents and profits can be appropriated and the provision for redemption. In other words depending upon the type of mortgage the operative clause will be drafted to comply with the law.

Possession: Transfer of possession is required in case of English mortgage and Usufructuary mortgage and this has to be specifically stated in this part of the deed.

Covenants: The mortgage deed will have a number of covenants which bind both the mortgagor and mortgagee. Covenant to repay the mortgage money within the stipulated time, covenant to repair the mortgage property, covenants to insure the mortgage property and keep it subsistent, covenant to pay the outgoings like rates, taxes etc will all have to be incorporated in the deed of mortgage.

Redemption: This is the period fixed by agreement between the parties. This should not be unduly long as it would amount to a clog on the equity of redemption (hindrance to redemption). Similarly the mortgagee cannot recall the mortgage money before a stipulated time. The limitation Act prescribes a

period of 30 years within which a suit for redemption can be brought by the mortgagor.

Execution and Attestation: Attestation is compulsory in every mortgage and where the party does not know the language the deed must be explained to him by a competent person.

Registration: Registration is compulsory in all cases where the value of money exceeds Rs.100. Equitable mortgage is not registered as it is not necessary.

Delivery of title deeds: A mortgagee is entitled to all the title deeds of the property and if through inadvertence or negligence any of them are left with the mortgagor, he can manipulate a prior equitable mortgage by depositing the same elsewhere.

DEED OF FURTHER CHARGE

Sometimes the mortgagor may require further sum of money on the same mortgaged property. In such cases a deed of further charge on the mortgaged property is executed between the parties. While the security and the conditions are the same as in the case of the original deed, this second deed will have to make a reference to the first mortgage between the parties. It should also set out the details of the new loan, its terms and repayment and make the same further charged on the same security and should be endorsed in the same manner as the original mortgage. A specimen of deed of further charge is given in **Annexure VII.**

MORTGAGE BY DEPOSIT OF TITLE DEEDS:

Mortgage by deposit of title deeds is also known in English law as equitable mortgage. It is a mortgage where no registration and no documentation is required. Sec.58 (f) of the Transfer of Property Act 1882 which deals with mortgage by deposit of title deeds states that a mortgage by deposit of title deeds is effected by the mortgagor delivering to the creditor or his authorized agent, documents of title to the immovable property with intent to create a security thereon in the towns of Calcutta, Madras, Bombay or any other town as notified by the Government in the Official gazette. The mortgage therefore requires depositing of original title deeds or delivering them with intent to borrow

money. So an acknowledgement is not necessary in this type of mortgage. However, it is prudent to keep a record of the transactions in order to avoid the difficulty to establish the creation of mortgage.

A memorandum of deposit of title deeds is usually created in order to have a record of the transaction of equitable mortgage. The record in addition to providing the basic details of the parties to the mortgage, gives details of the property as per the title deeds, the amount of money borrowed, the interest to be charged on the loan etc. The fact of having deposited the title deeds for securing the money borrowed is acknowledged by the borrower. A specimen of memorandum of equitable mortgage is given in **Annexure V.**

DEEDS OF FLOATING CHARGES

A Charge is created by the act of parties or operation of law and in this respect it differs from a mortgage. According to Sec.100 of the Transfer of Property Act 1882, where immovable property of one person is by act of parties or operation of law is made as a security for the payment of money to another person and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

While this being the definition of charge, Sec.125 of the Companies Act 1956 does not make a distinction between charge and mortgage.

While no specific words are required in a deed of charge, it is adequate if the document creating the charges mentions the circumstances which necessitated the charge and gives details of the property charged with intention to secure money. The Companies Act recognizes two types of charges, namely fixed charge and floating charge. A fixed charge is created on a definite property which is capable of being defined and is certain; whereas a floating charge is created on a property that is ambivalent and is constantly fluctuating till it finally settles on the happening of a specific event. For example a floating charge on the stock of the company, enables the company to utilize the stock and hence the value keeps changing till finally any eventuality happens which prevents further transaction making the charge as fixed. So if a charge is ambulatory, the company is able to carry on the business in the ordinary way using the charged property and is on a class of assets, such a charge is a floating charge. A floating charge will crystallize on the happening any specific event

which precludes from dealing with the charged property like liquidation, non-payment of borrowed money etc.

While a deed of floating charge is similar to a mortgage, the important point to be noted while drafting a deed of floating charge is that the deed should give the liberty to the borrower to deal with the charged property in the ordinary course of business and this should be made explicit in the deed.

DEEDS OF APPOINTMENT OF RECEIVER

The mortgage deed may also provide for appointment of a receiver of income from the mortgaged property in terms of Sec.69A of the transfer of property Act 1882. This section confers on the mortgagee the right to appoint a receiver of income of mortgaged property on his behalf. If the person so name is incapable of acting or is not willing to be a receiver, then the mortgagor and the mortgagee can by agreement appoint some other person as the receiver of income of mortgaged property. In the absence of any agreement or where the parties do not agree, they may approach the court for appointment of a receiver of income of mortgaged property.

The receiver of income of mortgaged property is required to apply all the money received by him as directed by the provisions of the act. He should utilize the money to discharge all statutory dues on the property like rent, rates and outgoings etc. He should utilize the money to pay all annual sums and interest on all principal sums having priority to the mortgage. The receiver of income shall utilize the income to pay his commission, premium on fire, life or other insurances, carry out repairs to mortgage property wherever required and also towards principal if directed by the mortgagee. In short the receiver is to act as an agent of the mortgagee to appropriate the income from the mortgaged property as directed by the provisions of the Transfer of Property Act 1882.

MEMORANDUM OF PLEDGE OF MOVABLES

Sec.172 of the Indian Contract Act 1872 defines pledge as a bailment of goods as security for payment of a debt or performance of promise. The bailor is called the pawnor and bailee is called the pawnee. The three essential ingredients of a pledge are therefore (a) Delivery of possession of the goods pledged –

bailment of goods (b) The bailment is done as security only and (c) This security is given for payment of a debt or performance of a promise. A pledge is different from a mortgage in that the pledgee only ***acquires the right to sell the pledged goods in case of default*** of payment of debt or performance of promise. A pledge can be made only by effective transfer of possession of goods pledged and therefore a mere licence to take, or a contract to give possession, although it may operate as a hypothecation, cannot constitute a pledge.

Pledge is not required to be made in writing but the bailment of goods may be accompanied by an agreement containing the terms of pledge. This memorandum of pledge shall contain the details of the goods pledged, the money secured by the pledge, the conditions for payment of such money and other terms and conditions of the agreement like the safety of goods with the pawnee and the right pay any outgoings on the goods like insurance premium and include the same as debt to be recovered from the pawnor. A specimen deed of pledge of movables is given in **Annexure VI.**

ANNEXURE I

DEED OF SIMPLE MORTGAGE

THIS DEED of mortgage made the ....day of ....2006 between AB of etc. (hereinafter called the mortgagor) of the one part and CD of etc. (hereinafter called the mortgagee) of the other part.

WHEREAS the Mortgagor is absolutely seized and possessed of the or otherwise is well and sufficiently entitled to the property intended to be hereby mortgaged which is free from all encumbrances and attachments;

AND WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs......... to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed;

NOW THIS DEED WITNESSES that in pursuance of the said agreement and in consideration of the sum of Rs.......... Paid to the Mortgagor by the Mortgagee simultaneously with the execution of these presents the receipt whereof the Mortgagor do hereby admit, acknowledge and confirm, the Mortgagor do hereby

agree with the Mortgagee that the Mortgagor will on or before the ....day of.........2006, pay or caused to be paid to the Mortgagee the sum of Rs..............with interest for the same in the meantime at the rate of ....per cent per annum such interest to be paid monthly and every month on the 7th of each following month without any delay or default.

AND THIS DEED further witnesses that as security for the repayment of the said loan with interest, the said AB hereby charge, assure and mortgage by way of Simple Mortgage unto and in favour of the said CD all the property more fully described in the Schedule hereunder and charge and assure the same by way of security of the said sum of money of Rs..........together with interest thereon at the rate of ....percent per annum.

AND THIS DEED FURTHER WITNESSETH and it is hereby agreed and declared between the parties that in case the said sum of money of Rs.............with interest thereon at the stipulated rate is not paid within the time and in the manner as aforesaid, it shall be lawful for the mortgagee to enforce this mortgage and to cause the property or any portion thereof to be sold and appropriate the proceeds towards satisfaction of the mortgage debt provided however that in the event of any short fall or deficiency the mortgagee is entitled to recover the same from the mortgagor personally and the mortgagor shall be entitled to redeem the said mortgage at his option by payment of the amount of mortgaged debt including interest thereon.

AND THIS DEED FURTHER WITNESSETH that the Mortgagor covenants with the Mortgagee that not withstanding any act, deed or thing hereinbefore done, executed, performed or suffered to the contrary, the Mortgagor has good title, full power and absolute authority to charge, assure and mortgage the said in the manner herein under effected and the same is free from all encumbrances and attachments.

SCHEDULE

IN WITNESS WHEREOF the parties herein under have set their hands on the day hereinabove mentioned.

MORTGAGOR MORTGAGEE

WITNESS:

1.

2.

ANNEXURE II

DEED OF MORTGAGE BY CONDITIONAL SALE

THIS DEED of mortgage made the ....day of ....2006 between AB of etc. (hereinafter called the mortgagor) of the one part and CD of etc. (hereinafter called the mortgagee) of the other part.

THIS DEED WITNESSES that in consideration of the sum of Rs.......paid to the mortgagor by the mortgagee, the Mortgagor do hereby grant, transfer, convey, assign and assure to the Mortgagee ALL that etc. TO HAVE AND TO HOLD the same absolutely and forever subject to the condition hereby expressly declared, namely, that if and when the Mortgagor shall repay or cause to be repaid the said sum of Rs..........with interest thereon at the rate of ....per cent per annum on or before .....day of ......2006, time for which purpose shall be deemed as essence of contract then and in such as event the sale hereby effected shall stand void and shall be of no effect to all intents and purposes and the Mortgagee shall at the cost of the Mortgagor reconvey and retransfer the said property and every part of thereof as then existing to the Mortgagor provided, however, that if the Mortgagor shall fail or neglect to repay the said sum with interest at the said rate on or before the said date, the sale hereby effected shall become absolute and the Mortgagee shall be entitled to foreclose the mortgage when and in such an event the Mortgagee shall be the absolute owner of the property freed and discharged from all right of equity of redemption of the Mortgagor.

AND IT IS HEREBY FURTHER AGREED AND DECLARED that notwithstanding anything hereinbefore contained the Mortgagor shall remain in possession of the said property and pay all rents, cess, taxes, rates and other impositions which are now or may hereafter be imposed on the said property and in case the Mortgagor fails or neglects to make such payments on or before the

due date of such payments thereof, the mortgagee shall be at liberty to pay the same and add such sum or sums to the principal money hereby secured which shall carry interest at the aforesaid rate. And the Mortgagor do hereby covenant with the Mortgagee that he has good title to the property and absolute authority and power to transfer the same in the manner herein before indicated and the property is free from all encumbrances and attachments whatsoever.

IN WITNESS WHEREOF the parties herein under have set their hands on the date and year herein above mentioned.

Signed, sealed and delivered

MORTGAGOR MORTGAGEE

WITNESSES:

1.

2.

ANNEXURE III

DEED OF USUFRUCTUARY MORTGAGE

THIS DEED of mortgage made the ....day of ....2006 between AB of etc. (hereinafter called the mortgagor) of the one part and CD of etc. (hereinafter called the mortgagee) of the other part.

THIS DEED WITNESSES that in consideration of the sum of Rs.......paid to the mortgagor by the mortgagee, the Mortgagor hereby conveys to the said Mortgagee, the said property more fully described in the Schedule hereunder from this day

AND THAT the mortgagee shall be in possession of the mortgaged property under the terms of the deed for securing payment on the ……..day of ……..2006, of the principal sum secured with interest thereon at Rs……………percent per annum, which mortgage money will be set off against the usufruct of the mortgaged property and the Mortgagee does hereby promise to keep clear accounts thereof.

AND THIS INDENTURE further witnesseth and it is agreed and declared that the Mortgagor hereby delivers possession of the said property to the Mortgagee who shall retain such possession until payment of the said sum with interest as aforesaid and shall receive the rent, issues and profits accruing from the said property and pay all rents, cesses, taxes and other impositions and appropriate the balance firstly, in payment of the interest due and then in reduction and payment of the principal sum advanced and that on such payment and satisfaction of the whole of the principal sum and interest thereon the Mortgagor shall be entitled to get back the possession of the said property.

AND IT is further agreed and declared that the Mortgagee shall at all times hereafter until the satisfaction of the mortgage debt take care of, manage and preserve the said property as person of ordinary prudence would manage it if it were his own and use his best endeavours to collect the rents and profits thereof and make necessary arrangements for maintenance, preservation and repair of the said property and keep clear, full and accurate accounts of all sums received and spent by him as Mortgagee and furnish the Mortgagor at his cost true copies of such accounts and of the receipts and vouchers by which they are supported.

AND IT IS further more agreed that in any event after the expiry of ……..years the mortgage debt shall be deemed as satisfied and extinguished out of the usufruct of the property and the Mortgagee shall unconditionally reconvey the property to the Mortgagor at his costs and expense.

IN WITNESS WHERE OF ……

Signed, sealed and delivered

SCHEDULE OF THE PROPERTY

MORTGAGOR MORTAGAGEE

WINTNESS:

1.

2.

ANNEXURE IV

DEED OF ENGLISH MORTGAGE

THIS DEED of mortgage made the ....day of ....2006 between AB of etc. (hereinafter called the mortgagor) of the one part and CD of etc. (hereinafter called the mortgagee) of the other part.

WHEREAS the Mortgagor is absolutely seized and possessed of the or otherwise is well and sufficiently entitled to the property intended to be hereby mortgaged which is free from all encumbrances and attachments;

AND WHEREAS the Mortgagee has agreed to lend and advance a sum of Rs......... to the Mortgagor at his request upon having the repayment thereof, with interest at the rate hereunder stated and secured in the manner hereinafter expressed;

NOW THIS DEED WITNESSES that in pursuance of the said agreement and in consideration of the sum of Rs.......... Paid to the Mortgagor by the Mortgagee simultaneously with the execution of these presents the receipt whereof the Mortgagor do hereby admit, acknowledge and confirm, the Mortgagor do hereby agree with the Mortgagee that the Mortgagor will on or before the ....day of.........2006, pay or caused to be paid to the Mortgagee the sum of Rs..............with interest for the same in the meantime at the rate of ....per cent per annum such interest to be paid monthly and every month on the 15th of each following month without any delay or default.

AND THIS DEED further witnesses that as security for the repayment of the said loan with interest, the said AB hereby as the beneficial owner, do hereby grant, transfer, convey unto and to the use of said CD the said property more

fully described in the Schedule hereunder; TO HAVE AND TO HOLD the same absolutely and for ever PROVIDED ALWAYS that if the Mortgagor shall pay or cause to be paid the said sum of Rs.........with interest thereon, on the ....day of ....according to the foregoing agreement in that behalf, the Mortgagee, his heirs, representatives or assigns shall, at the request and cost of the mortgagor, his heirs, representatives or assigns, reconvey to him or to them as he or they shall direct, the said property.

AND THAT the Mortgagor do hereby covenant unto the Mortgagee that the Mortgagor has absolute title to the land, herditaments, messages and premises hereby granted and conveyed and that the Mortgagor has good right, full power and absolute authority and indefeasible title to grant, convey, transfer, assign and assure the same unto and to the use of the Mortgagee in the manner herein before indicated and further the Mortgagor and all persons having lawfully and equitably any estate or interest in the same shall at all times hereafter during the continuance of the security do execute or perform or cause to be done executed and performed all such further or other acts, deeds and things as may be reasonably required for further and more perfectly assuring the same unto and in favour of the mortgagee.

PROVIDED however, and it is further agreed by and between the parties that if the Mortgagor commits any default in payment of principal amount on the due date or three instalments of interest, whether they have been demanded or not, it shall be lawful for the mortgagee to institute a suit for sale and to have a receiver appointed over the mortgaged property.

IN WITNESS WHEREOF ....

SCHEDULE ABOVE REFERRED

MORTGAGOR MORTGAGEE

WITNESS:

1.

2.

ANNEXURE V

MEMORANDUM OF MORTGAGE BY DEPOSIT OF TITLE DEEDS

MEMORANDUM that this ....day of ....AB of etc. (the mortgagor) as beneficial owner, has deposited with CD of etc. (the mortgagee) the original title deeds comprised in the Schedule A hereto relating to the premises belonging to the said AB and situate at etc.. described in Schedule B with intent to create a charge thereon for securing repayment to the said CD of the sum of Rs.....this day lent and advanced by the said CD to the said AB on demand with interest for the same from this date at the rate of Rs.... percent per annum.

The said AB do hereby undertake as and when required by the by the said CD to execute and register at the costs of the said AB a legal mortgage in such form and containing such covenants and provisions as he may reasonably require.

Dated this..........day of 2006

SCHEDULE A ABOVE REFERRED TO

DESCRIPTION OF THE TITLE DEEDS DEPOSITED

SCHEDULE B ABOVE REFERRED TO

DESCRIPTION OF THE PROPERTY

SIGNATURE OF THE MORTGAGOR

ANNEXURE VI

MEMORANDUM OF PLEDGE OF MOVABLES

To

CD of etc. (the pledge)

The articles specified in the annexed schedule which I, the undersigned AB of etc. (the pledgor) have this day deposited with you, are to be held as security for the repayment to you within .....months from this date, of the sum of Rs.......which you have this day lent and advanced to me together with interest

at the rate of Rs…….percent per annum. And I hereby authorize and empower you, in the event of non-payment thereof within that period, to sell the same or cause the same to be sold at any time in any way you may think proper, at my risk and on my account and out of the proceeds of such sale, after paying all costs, charges and expenses of incidental to the same, to retain, appropriate the said sum of Rs……..and interest and pay the balance if any to me. You would not be liable for any loss or damage of or to the said articles unless caused by your own willful negligence or default. In case of any shortfall, I shall remain personally responsible to pay for the same to you with interest at the aforesaid rate.

SIGNED SEALED AND DELIVERED

SCHEDULE ABOVE REFERRED

ANNEXURE VII

DEED OF FURTHER CHARGE

This further Charge made the ………day of ………..2006, Between AB of etc.. (hereinafter called the borrower) of the one part; and CD of etc… (hereinafter called the mortgagee) of the other part;

WHEREAS by a mortgage deed dated ……..the property mentioned therein and described in the Schedule attached hereto was mortgaged by the borrower with the mortgagee and the sum of Rs………remains to the mortgagee on the security of the said mortgage but all interest for the same has been paid up to the date of this deed.

AND WHEREAS the mortgagee has agreed to advance to the borrower the further sum of Rs………upon terms and conditions and secured in the manner herein after appearing.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the said sum of Rs…………now paid by the mortgagee to the borrower the receipt whereof the borrower hereby acknowledges:

1. The borrower hereby covenants with the mortgagee to pay to the mortgagee on the ……….day of ………2006 next sum of Rs……..principal amount with interest at the rate of ……..percent per annum and if the said money are not paid on the aforesaid date, to pay interest at the said rate until payment.
2. The borrower as beneficial owner hereby declares that all and singular the property mortgaged under the aforesaid deed dated …….and more particularly described in the Schedule attached hereto shall be security and stand charged with the payment to the mortgagee of the sum of Rs……..the present advance with interest at the rate of ………percent per annum from the date of execution of these presents as well as the sum of Rs……….due on the recited mortgage together with interest thereon and shall not be redeemable until on payment to the mortgage deed dated ……..and the present deed.
3. It is further agreed and declared that the provisions contained in the mortgage deed dated ……..shall operate and take effect in like manner for securing payment or the money hereby secured as if the same has formed part of the money secured by the said recited mortgage.

IN WITNESS WHEREOF the parties herein under have set their hands on the date and year herein above mentioned.

MORTGAGOR MORTGAGEE

WITNESS:

1.

2.

SCHEDULE ABOVE REFERRED TO

Review Questions:

1. What are important clauses to be incorporated in a mortgage deed?
2. Define Simple mortgage. How does it differ from English Mortgage?
3. Draft a deed of Mortgage by deposit of title deeds. State essential aspects of this deed.
4. Define a Pledge. Draft a memorandum of pledge of movable property.
5. What is a floating charge? How does it differ from a fixed charge?
6. When is a deed of further charge made? What are the important ingredients of this deed?
7. Draft a memorandum of Mortgage by deposit of title deeds.

* * *

UNIT – 4

DEED OF ASSIGNMENT

INTRODUCTION

An assignment is a type of transfer of property and is more relevant in the case of transfer of any debt or actionable claim. The common law looked upon debt as a personal obligation and the assignee could only bring in action in law against the debtor. However the Transfer of Property Act 1882 has recognized actionable claim as a valuable property. Sec.130 of the Act states that a valid assignment of an actionable claim must be in writing and signed by the transferor or his agent.

Sec.3 of the Transfer of Property Act 1882 defines an actionable claim as a claim to any debt, other than a debt secured by Mortgage of immovable property, or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession either actual or constructive, of the claimant, which the civil courts recognize as affording ground for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

From the foregoing definition, it is clear that the transfer of an actionable claim can be made only in writing by means of an instrument of transfer duly signed by the transferor or his agent. Once this instrument is executed, all rights and claims that were available hitherto to the transferor will vest in the transferee and will be available to the transferee. The transferee of an actionable claim may, upon execution of such instrument of transfer, can institute proceedings for the same in his own name without obtaining the consent of the transferor and without making him a party.

ASSIGNMENT OF BUSINESS DEBT

Business debt is similar money due under an obligation. It can take different forms like money under an insurance policy, money due between the principal and agent, master and servant, arrears of wages, arrears of statutory dues like Provident Fund dues, arrears of rent etc. A debt is like a property. It is transferable and assignable. While an assignment of a debt requires

consideration but non-payment of consideration cannot be a ground to the debtor for non-payment of the debt. The payment of consideration is between the assignor and assignee.

A deed of assignment of business debt merely transfers the right to the assignee for a consideration. The format of such deeds is similar to transfer of any other debt like bond debt. In this deed the assignor simply passes on the right he has over the debtor to the assignee for a consideration. A Specimen deed of assignment of business debt is given in **Annexure I.**

ASSIGNMENT OF SHARES IN A COMPANY

A 'share' in a company is a right to a certain amount of the share capital of the company and it carries with it certain rights and liabilities. It is considered as "goods" as defined in the Sale of goods Act 1930. The articles of association of a company and the model articles in Table A (Clause 19 and 20) of Schedule I to the Companies Act 1956 provide for transfer of shares. While a company cannot perse refuse transfer of shares but can only put in place certain restrictions and conditions for transfer of shares. Sec.108 of Companies Act 1956 lays down the provision for transfer of shares. These transfers are effected through an instrument of transfer (Form 7B) executed between the transferor and transferee. The shares of a company can also be assigned as any other business transaction. A specimen deed of assignment of shares is given in **Annexure II.**

ASSIGNMENT OF POLICIES OF INSURANCE

The Insurance Act 1938 and the Life Insurance Act 1956 do have provisions for assignment of policies. Policy of Life insurance secures a specified sum of money payable on the life of the insured on his death. A policy of insurance in any other case is a contract to be paid on the happening of certain event which is specified in the policy. These policies of insurance can be assigned in the prescribed manner. A policy of life insurance has to be assigned before the death of the insured. The only condition for assignment of an insurance policy is that the person assigning the policy should have insurable interest in the policy. A specimen of assignment of Policy of Life insurance is given in **Annexure III.**

ASSIGNMENT OF PATENTS, TRADE MARKS AND COPYRIGHTS

The Patents Act 1970 confers on the grantee the right and exclusive privilege of making or selling a new invention granted by a Patent and safeguard such right and seek legal remedy in case of its infringement. The Patent is sealed at the Office of the Controller of Patents and gives the exclusive right to the Patentee over third parties to the product or process contained in the subject matter of the Patent. Sec.68 of the Patent Act 1970 provides for assignment of Patent. The section provides for assignment of the patentee subject to the conditions that the terms of the assignment are incorporated in a document and such document is registered with the controller of patents. The Person who becomes entitled to the Patent by virtue of assignment as aforesaid can approach the controller to register his title or his interest in the Register of Patents. The assignment of a Patent can also take place by operation of law or by a mortgagee or licensee as a part of an agreement of mortgage or license. A Specimen deed of assignment of a Patent is give in Annexure **IV**

A Trade Mark is a representative device in the form of a word or words or a label or any other mark which distinguishes the goods of a person from that of his competitors and detractors. The right to use a mark or symbol is a right conferred by common law and in view of the globalization of trade and commerce and introduction of new commercial practices and recognition of intellectual property being more pronounced, separate law has been enacted for Trade mark as in the case of patent. The Trade Marks Act 1999 provides for Registration of Trade Marks for goods and services and also prevents of imitation of well known trade marks. The Person seeking to register the Trade mark should establish his right by producing the necessary documents required and register himself as the Proprietor of the Trade mark with the Trade Mark Registry. Then the Trade mark registered with the Registry is and will be said to belong to the Proprietor. Sec.37 of the Trade Marks Act 1999 confers on the Registered Proprietor the right to assign his mark to any person subject to a consideration. Sec.38 states further that a Registered Trade mark is assignable and tramissible with or without the good will of the business and in respect of all such goods or some of such goods as desired by the Proprietor of the mark. A specimen deed of assignment of Trade mark is given **Annexure V**

The Copy Right Act 1957 grants an exclusive right to the person holding the right in relation to reproduction, production, publication, performance,

translation, recording, selling, communicating etc to do or authorize do any act in respect of any work or part of the work of literary or artistic nature. Sec.18 of this act gives to the owner of a copy right or a prospective owner the right to assign the copy right wholly or partially subject to the terms and conditions and limitations that may be agree between the parties. The assignee of a copy right shall be entitled to all the rights and privileges as in the case of a owner of copy right. A specimen deed of assignment of a Copy Right is given **Annexure VI.**

ASSIGNMENT OF BUSINES AND GOOD WILL & OTHER INTERESTS

Goodwill is an intangible asset in a business. It is a value which accrues to a business from its reputation, standing, effective publicity, growth and management. It is a business practice which flows out of certain inherent advantages to business either because of its unique position, performance and skill. It may also be due to the monopolistic nature of the undertaking, possession of certain exclusive rights etc. A deed of assignment of Goodwill is normally done along with the deed of sale of business as good will is a part of the business. The assignment of Goodwill will be incorporated in the sale deed of business.

DEED OF EXCHANGE

An exchange is a sort of barter transaction. Sec.118 of the Transfer of property Act 1882 states that when two persons mutually transfer the ownership of one thing for the ownership of another neither things or both things being money only, the transaction is called an Exchange. In an exchange, in addition to transfer of property there may be payment of money by one party to equalize the exchange. If any party to the exchange is deprived of the thing due to defect in title and in the absence of a contrary intention appearing from the terms of the exchange, the other party shall compensate for the loss or return of the thing transferred if still in his possession or in possession of a transferee without consideration. In case of exchange money each party guarantees the genuineness of the money. A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale and registration will or will not be compulsory depending upon the value of the property. The transfer of property by exchange differs from a sale in that in a

sale price is paid as consideration whereas in an exchange some other property is the consideration.

A deed of exchange is drafted in the same manner as in the case of sale. There are different forms of deeds of exchange depending upon the nature of transaction. It may be a deed of exchange of properties or an exchange of property by one party by one deed and payment of money by another deed. A deed of exchange is in fact a double transfer in which one transfer is the consideration for the other. This deed is executed in duplicate and one party takes the original and the other the duplicate. Registration of deed of exchange is compulsory under the Transfer of Property Act 1882 where the value of the property exceeds Rs.100. However, the doctrine of Part performance enshrined in Sec.53A of the Act protects the parties to the exchange from Non registration. This section provides that where parties to an exchange have taken possession without registered conveyance each party will be entitled to defend his title and continue in possession of the property. A Specimen deed of exchange of properties is given **Annexure VII.**

DEED OF GIFTS

A Gift is a voluntary transfer of property in consideration of natural love and affection to a living person. (Sec.122 of the Transfer of Property Act 1882) It must be free, voluntary, absolute and unconditional except in cases where gift is made for a particular purpose like educational or philanthropic or religious, in which case, it is to be used for that purpose only or it will revert back to the donor. In case of Gift of movable property also it must be voluntary and without consideration. A Gift of immovable property can be effected by a registered instrument duly signed by the donor and attested by witnesses. Yet another condition in case of a gift is that it must be accepted by the donee. Gift without acceptance is invalid.

A deed of gift is drafted as in case of a deed of transfer of immovable property. The most important difference is that there is no consideration in a gift and hence this clause pertaining to consideration will not find a place in the Gift deed. The deed will also use the words ‘love and affection’ and ‘esteem regards’ etc to convey the intention of the donor in making the gift. The deed must contain the value of the property gifted and the stamp duty for the instrument is arrived at based on this value. A deed of Gift of immovable property is required

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to be registered compulsorily. Gift deeds may in different forms depending upon the nature of gift. It may be gift out of love and affection or for a particular purpose or may relate to business or may be for a charitable cause.

A specimen deed of gift in consideration of Natural love and of gift for a particular purpose is given **Annexure VIII and IX.**

ANNEXURE I

THIS DEED OF ASSIGNMENT made the ….day of ………between AB of etc. (hereinafter called the *'assignor'*) of the one part; and CD of etc. (hereinafter called the '*assignee')* of the other part;

WHEREAS the assignor has for some time past carried on the trade of business of ……….in the course whereof several persons whose names, addresses and occupations are mentioned in the schedule hereunder written, have become lawfully indebted to him in respect of several sums of money written opposite to their names;

AND WHEREAS the assignor has contracted with the assignee for the absolute sale to him of the said business debts at and for sum of Rs……………..;

NOW THIS DEED WITNESSES that in consideration of the sum of Rs………..now paid to assignor by the assignee (the receipt of which the assignor acknowledges) the said AB as beneficial owner do hereby, grant, transfer, sell and assign unto and to the use of the said CD All the several said debts and sums of money specified in the said schedule which are now lawfully due and owing to the assignor together with all interest due thereon and all benefits of security or securities of accounts therefore, if any, to have and to receive them for his absolute benefit with absolute power and enforce payment thereof by suit or otherwise;

AND THAT the assignor do hereby covenant with the assignee that all several debts are lawfully due and payable to him and further that the parties by whom they are payable are alive and not insolvent and further more that he has not entered into any compromise agreement or arrangement with any of them nor committed himself in any way as to any time indulgence or concession nor

written off any of them with a view to exonerate any of them from all liabilities on that account;

AND THAT the assignor shall at all times hereafter co-operate with the assignee and execute and perform all such further acts, deeds, things or writings as may be reasonably required for realization of the said debts and more effectively transferring them or assuring them or any of them and in favour of the assignee as may be reasonably required.

SCHEDULE ABOVE REFERRED

ASSIGNOR ASSIGNEE

Signed, sealed and delivered.

ANNEXURE II

DEED OF ASSIGNMENT OF SHARES IN A COMPANY

THIS ASSIGNMENT is made the ....day of ....BETWEEN AB of etc. (hereinafter called '*assignor*') of the one part; and CD etc (hereinafter called the '*assignee*') of the other part;

THIS DEED WITNESSES that in consideration of the sum of Rs.......paid by the assignee to the assignor, the receipt whereof the assignor hereby acknowledges, the said AB hereby assigns and transfers to the said CD ....ordinary shares of Rs.........each numbered ....to ....which stand in the name of assignor in the books of ....Company ltd. To have and to hold the same to the assignee absolutely, subject nevertheless to the conditions of the Memorandum and Articles of Association of the Company on which the assignor held the same up to date.

AND THE ASSIGNEE agrees to take the said shares subject to such conditions.

IN WITNESS WHEREOF etc.....

AB

Singed, sealed and delivered.

ANNEXURE III

DEED OF ASSIGNMENT OF LIFE INSURANCE POLICY

THIS ASSIGNMENT is made the ……..day of ………BETWEEN AB of etc. (hereinafter called '*assignor*') of the one part; and CD etc (hereinafter called the '*assignee*') of the other part;

WHEREAS a policy of insurance bearing no……….for Rs……was issued by the Life Insurance Corporation of India on the life of the assignor on the …….day of ……..to be paid to the assignor on maturity or to his nominee or heirs, executors, administrators or assigns after his death, subject to the payment of annual premium of Rs…….;

AND WHEREAS the said AB has agreed to transfer and assign unto and in favour of the said CD the said policy of assurance for a sum of Rs……..;

NOW THIS DEED WITNESSESS that in consideration of the sum of Rs…….. paid by the said CD, the receipt whereof the said AB does hereby admit and acknowledge, the said AB does hereby transfer and assign unto and to the use and for the benefit of CD the above recited policy of assurance together with the benefit of the said sum of Rs……thereby assured and all other moneys, profits, benefits and advantages thereof to be had, recovered or obtained under or by virtue of the said policy;

TO HAVE AND TO HOLD the same unto and to the use of said CD absolutely, subject to the conditions as to payment of future premiums and otherwise to be henceforth observed in respect of the said policy;

AND the said AB hereby covenant with the said CD that he, the said AB, shall not do, execute or perform or knowingly suffer anything to the contrary whereby or by reason or means whereof the said policy may be rendered void or voidable, or the said CD or his heirs, executors, administrators or assigns may be prevented from receiving the said sum of Rs……..or any benefit or advantage thereunder.

IN WITNESS WHEREOF ETC…..

Signed, sealed and delivered

AB

ANNEXURE IV

DEED OF ASSIGNMENT OF PATENT

THIS ASSIGNMENT is made the ……..day of ………BETWEEN AB of etc. (hereinafter called '*assignor*') of the one part; and CD etc (hereinafter called the '*assignee*') of the other part;

WHEREAS the assignor is an inventor and patentee in respect of a machine (state the nature of the patent);

AND WHEREAS the said patent was duly registered on the …..day of …….20…..as number……in the Patent Office at……and the Patentee viz. the said AB has thus exclusive privilege and authority to use the same for a period of ……..years from the aforesaid date subject to the payment of prescribed fee within time;

AND WHEREAS the said AB has agreed to assign and the said CD has agreed to purchase the benefit of the said invention and the patent at and for the price of Rs………..;

NOW THIS DEED OF ASSIGNMENT WITNESSES that in pursuance of the said agreement and in consideration of the said sum of Rs…………paid by the said CD to the said AB which the assignor AB doth hereby admit, acknowledge, and confirm as having had and received from the assignee CD, the said AB as beneficial owner hereby grant, transfer and assign unto CD the said assignee, all that the said invention and patent and the full and exclusive benefit and advantage thereof AND all and every improvement, extension or renewal thereof;

TO HAVE AND TO HOLD the same AND said assignor hereby covenants with the said assignee that notwithstanding anything done or omitted or knowingly suffered the said patent is now valid and subsisting.

AND the said assignor further covenants with the said assignee that he will at the cost of the person requiring the same do all such things for further assuring this transfer unto the said assignee as may be required for the registration of the assignment with the Controller of Patents and Designs under the Provisions of the Patents Act 1970.

IN WITNESS WHEREOF ETC….

Signed sealed and delivered.

AB

ANNEXURE V

DEED OF ASSIGNMENT OF TRADE MARK

THIS ASSIGNMENT is made the ……..day of ………BETWEEN AB of etc. (hereinafter called '*assignor*') of the one part; and CD etc (hereinafter called the '*assignee*') of the other part;

WHEREAS the said AB is the owner and the proprietor of a Trade Mark number………duly registered in the Register of Trade Marks maintained by the Trade mark registration office at ……….;

AND WHEREAS the said AB has made actual and bona fide use of the said Trade Mark in India in relation to the toilet goods manufactured by him at his factory in……….;

NOW THIS DEED OF ASSIGNMENT WITNESSES that in pursuance of the said agreement and in consideration of the said sum of Rs…………paid by the said CD to the said AB which the assignor AB doth hereby admit, acknowledge, and confirm as having had and received from the assignee CD, the said AB as beneficial owner hereby grant, transfer and assign unto CD the said assignee, upon the terms hereinafter mentioned, the exclusive use and all benefits of the aforesaid Trade Mark in relation to the goods of toiletry manufactured by him at his factory in ………..;

AND THE said assignor hereby covenants with the assignee that he will not infringe nor use a mark identical with the Trade Mark hereby assigned nor use another Trade Mark nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to the goods in respect of which it is registered and in a manner as to render the use of this mark likely to be taken either as being a use of the said mark or to import a reference to the assignor.

AND THE assignor further covenants that he, the assignor shall at the costs of CD or any other persons claiming through him do or cause to be done any other act or deed or thing as may be required for more perfectly assuring the aforesaid assignment.

IN WITNESS WHEREOF ETC….

Singed sealed and delivered.

AB

ANNEXURE VI

DEED OF ASSIGNMENT OF COPYRIGHTOF A BOOK

THIS ASSIGNMENT is made the …….day of ………BETWEEN AB of etc. (hereinafter called '*author'*) of the one part; and CD etc (hereinafter called the '*Publisher'*) of the other part;

WHEREAS the author is entitled to the Copy right of the book known as …………

AND WHEREAS the publisher approached the author for assignment thereof, which the author has agreed to do on the terms and conditions herein under contained;

NOW THIS DEED OF ASSIGNMENT WITNESSES that in pursuance of the said agreement and in consideration of the said sum of Rs…………paid by the said CD to the said AB which the assignor AB doth hereby admit, acknowledge, and confirm as having had and received from the assignee CD, the said AB as the owner of the copy right do hereby grant, transfer and assign unto CD the said assignee, upon the terms hereinafter mentioned, all that copy right as defined in Sec.14 of the Copy right Act 1957 of the book entitled ……..on the subject of ………to have and to hold the same as absolute owner thereof for the full term of copy right as prescribed by law.

THE PUBLISHER shall cause to be paid to the author or his nominee or nominees a royalty at the rate of ....percent on the sale proceeds of the work or adaptations and translations thereof that may be actually published and submit to the author twice every year a statement of account showing details of copies printed, published, held in stock and sold or disposed of and the royalty payable thereon;

THE PUBLISHER shall also pay to the author half the net profits earned by them from any transfer sale or assignment of any copyright or from the grant of any interest or licence therein;

THAT THE AUTHOR does hereby declare that the work of which the copyright is being assigned is entirely the original work of the author and it does not violate or infringe any of the existing copyrights and it does not contain anything which is obscene, libelous, scandalous or defamatory.

THE AUTHOR hereby agrees to indemnify the publisher and keep him indemnified against all claims, demands, suits and other actions and proceedings, if any, that may be instituted against him and also against all cost, damages, charges, expenses which the publisher may suffer on account of printing, publication and sale of the said book being an infringement of some one else copyright or other rights or by reason of it containing any obscene, libelous or scandalous matter.

The publisher shall print and publish the work or cause the same to be done within a period of twelve months from the date of this agreement and in default thereof, the author may by a notice in writing give to the publisher a further period of two months to publish the work and the publisher shall still fail or neglect to print, the author shall be at liberty to rescind the contract on giving notice to that effect to the publisher when the copyright shall revert fully to the author and all the rights of the publisher shall as from that date stand determined.

That in the event of a difference or dispute between the parties with regard to the meaning, construction, interpretation, breach or fulfillment or otherwise of the terms of these presents, the same shall be referred to the decision of two arbitrators, each to be nominated by either party and in case of difference of opinion by the arbitrators to an umpire to be nominated by the arbitrators and the award of the arbitrators or umpire shall be binding on both the parties.

IN WITNESS WHEREOF ETC....

Singed sealed and delivered.

Author Publisher

ANNEXURE VII

DEED OF EXCHANGE

THIS EXCHANGE IS made the ....day of ....BETWEEN AB of etc...of the one part and CD of etc... of the other part.

WHEREAS the said AB is sole and absolute owner in possession of the property comprised in Schedule "A" hereunder;

AND WHEREAS the said CD is the sole and absolute owner in possession of the property comprised in Schedule "B" hereunder;

AND WHEREAS the parties have agreed to mutually exchange and transfer of the ownership of the said properties as between them, viz. that the said AB shall the convey the property is Schedule "A" to CD who will convey in lieu thereof the property in Schedule "B" to AB.

NOW THIS DEED WITNESSES that in pursuance of the aforesaid agreement and in consideration of the transfer effected by CD as hereunder appearing, the said AB as beneficial owner do hereby grant, convey, transfer, assign and assure unto and in favour of the said CD, free from encumbrances the house and premises etc.. comprised in Schedule "A" to HAVE AND TO HOLD the same absolutely and forever in exchange for what is hereunder transferred by the said CD in favour of AB.

AND THAT the said CD in further pursuance of the said agreement and in consideration of the transfer effected by AB as beneficial owner do hereby grant, convey, transfer, assign and assure unto and in favour of said AB, free from encumbrances, the land etc.. comprised in Schedule "B" hereto to HAVE AND TO HOLD the same absolutely and for ever in exchange for the transfer as aforesaid effected by CD in favour of AB.

IT IS HEREBY AGREED AND DECLARED that each party hereto has good right, full power, absolute authority, and indefeasible title to give, grant, transfer and convey the property exchanged by this deed:

AND that each party shall at all times hereafter peaceably and quietly hold, possess and enjoy the same without any claim, demand or interruption by the other and will, at the request and cost of the other, execute every such assurance or assurances and further do execute and perform every such act, deed or thing as shall reasonably be required by the other for further and more perfectly assuring to the other the property hereby conveyed to him.

IT IS HEREBY FURTHER DECLARED that the value of the property specified in each of the schedules is equal and the same is Rs…….only.

IN WITNESS ETC.

Singed sealed and delivered. AB CD

ANNEXURE VIII

DEED OF GIFT OF PROPERTY IN CONSIDERATION OF NATURAL LOVE

THIS DEED OF GIFT made this ………day of …….BETWEEN AB of etc… (hereinafter called the Donor) of the one part and CD of etc.. (hereinafter called the Donee) of the other part:

THIS DEED WITNESSES that in consideration of the natural love and affection which the donor had and still have for the donee, the latter being his daughter, the donor do hereby and hereunder renounce the same in and grant, convey, transfer, give and assure unto and to the use of the donee, freely and voluntarily, the property mentioned and described in Schedule hereto and hereinafter referred to as the said property and delivered possession of the same for her sole use and benefit absolutely and unconditionally for ever.

AND THAT DONEE accepts the gift of the said property hereunder made as testified by here being a party hereto and executing these presents. The estimated value of the property is Rs…………

IN WITNESS ETC.

Singed sealed and delivered.

AB

ANNEXURE IX

DEED OF GIFT OF PROPERTY FOR A PARTICULAR PURPOSE.

THIS DEED OF GIFT made this ....day of ....BETWEEN AB of etc... (hereinafter called the Donor) of the one part and CD of etc.. (hereinafter called the Donee) of the other part:

WHEREAS THE DONEE intends to start a old age home in his village for the welfare of old and destitute persons

AND WHEREAS the Donor is desirous of donating the property more fully described in the Schedule hereunder;

NOW THIS DEED WITNESSES that in pursuance of the said wish and as a patron of the proposed old age home to be started by the donee, the donor hereby freely and voluntarily grant, convey, transfer, assign and assure unto and to the use of the donee and his successors and assigns ALL THAT etc. etc. to be used solely and exclusively for the purpose of the old age home TO HVE AND TO HOLD the same so long as the same shall be used and occupied as building of the old age home AND THAT donee accepts the gift of the said property hereunder made solely and exclusively for the purpose hereinbefore indicated subject to the conditions hereinafter contained.

THIS DEED FURTHER WITNESSES that it is expressly agreed and understood by and between the parties that this gift of property will stand ipso facto revoked in event the property hereunder is not used for purpose intended for which the same is given within a period of one year from the date of this presents or if the said old age home is abolished, shifted or amalgamated with any other old age home when and in all such events, the property shall revert to the donor or his heirs, executors and administrators and shall form part of his former estate as if this deed of gift was never executed nor intended.

AND IT IS FURTHER AGREED between the parties that in case the property is acquired by the Government, the donee or his successors shall invest the compensation money to be awarded in purchase of another property to be used solely and exclusively for old age home unless otherwise directed by a competent court. The estimated value of the property is Rs...........

IN WITNESS WHEREOF the donor has executed this deed of gift and delivered the same to the donee who has also executed the same in token of acceptance thereof the day, month and year first above written.

SCHEDULE ABOVE REFERRED TO

Singed sealed and delivered.

AB CD

Review Questions:

1. Distinguish exchange from a Sale. Draft specimen deed of exchange.
2. State the important clauses in a deed of Gift for particular purpose. What will happen if the purpose is not full filled?
3. Draft a specimen deed of Assignment of Copy right.
4. Define a trade mark. State the legal provisions for assignment of trade mark.
5. The shares of a company can be assigned. Draft a deed of assignment of shares and also bring out the salient features of this assignment.
6. Define assignment. Whether assignment is a transfer within the meaning of transfer of property act 1882?
7. Draft a specimen deed of assignment of life insurance policy.

* * *

UNIT – 5

DRAFTING OF OTHER DOCUMENTS, PETITIONS AND APPLICATIONS

APPLICATIONS TO PUBLIC FINANCIAL INSTITUTIONS

Firms and Companies are required to make applications to various financial institutions at different times for financial assistance. This assistance can be in the form of terms loans, soft loans, and foreign currency loans or may be for working capital requirements in the form of cash credit, bills or even guarantees. The financial assistance is provided by the financial institutions after ascertaining the viability of the project for which assistance is required.

Consortium Lending in recent times has become popular where a group of financial institutions or banks jointly finance a project. In such cases the borrower is required to submit a single application and if accepted the consortium will decide on the application jointly and then the respective institutions will separately sanction their portion.

Single Window Concept introduced by the Government in recent times enables the borrower to deal only with the lead institution which will clear the funding after discussing with the respective financial institution. The borrower is not required to approach the non-lead institutions.

Applications to Financial Institutions should provide all the necessary minute details so that the firm or the corporate need not waste time in the processing stage. All financial data including audited accounts and balance sheets for at least preceding five years should be provided to the institution. The details should include apart from the financial position, the earlier borrowings made by the firm or corporate, the encumbrances on properties created thereon, the loans already cleared with the dates of clearances and the loans still to be paid with the amount.

A specimen form of loan agreement with a Financial Institution is given in **Annexure I.** The agreement shall contain, apart from the parties and the loan amount, details of security, the nature of security, the interest payable on the loan, the covenant to the borrower institution not to sell or lease or mortgage or dispose of any assets charged to the financial institution and the covenant that in

default of payment, the financial institution is entitled to recover the loan by selling the property etc.

PROVISIONS RELATING TO APPEALS

There are a number of corporate legislations governing the activities of the corporate sector in various areas of Economy, Labour, Business, Industry, Taxation, Foreign Exchange etc. These enactments contain provisions of appeal to appellate authorities under different circumstances during their existence. Some of the provisions of appeal of some of the enactments are discussed below:

Competition Act 2002:

This act which replaced the erstwhile Monopolistic and Restrictive Trader Practices Act 2002, have provisions for appeal against the order of the Commission which enquires into a Restrictive or Unfair Trade Practice to the Supreme Court as per the Code of Civil Procedure.

Securities Contract Act 1956:

The companies going for a public issue are required to list the shares in a recognized stock exchange and if for any reason the stock exchange refuses to list the Company shares, then the company is entitled to appeal to the Central government against the order of the stock exchange. The central government is empowered to vary or set aside the decision of the stock exchange.

Foreign Exchange Management Act 1999:

The enactment has provision for appointment of appellate authorities to hear appeals against the order of adjudicating authorities. As this enactment is primarily intended to enforce discipline in Foreign Exchange transactions, there are a number of enforcement authorities who adjudicate on various matters. Appeals can be preferred against the order of these adjudicating authorities to the Special Director (Appeals) under this law. In addition the central government has constituted appellate tribunals to hear appeals against the order of the Special Director (appeals). The tribunal shall consist of such number of persons as decided by the Government and will have chairperson. Only eminent persons qualified to be judge of a High Court shall be appointed to these tribunals. The aggrieved party can appeal against the order of the tribunal to the High Court.

Companies Act 1956:

The companies Act 1956 is administered by the Central Government under the tutelage of the Company Law Board. This administrative body consists of various adjudicating authorities. It has constituted benches at different places to hear petitions and appeals. It has four Regional directorates and they are also empowered to hear appeals in certain cases. The Registrar of companies which is the basic authority for taking documents on record is also under certain circumstances required to adjudicate. Appeals can be preferred to the Company Law board bench against the orders of the Registrar of Companies and the Regional Director. The orders of the Company Law Board can also be challenged in the High Court. In cases of Merger and amalgamation the High Court is the authority to hear petitions and decide on the scheme of arrangement or compromise.

Income Tax Act 1961:

The tax law involves more appeals as there are many instances where the decision of the assessing officer as the adjudicating authority is challenged by the assesses. The Deputy Commissioner (Appeals), the Commissioner (Appeals), the appellate tribunal are the appellate authorities under this enactment. In addition the assessee can appeal to the High Court against the order of the appellate tribunal. A specimen form of appeal to the Commissioner (Appeals) and Appellate Tribunal are given in **Annexure II and III.**

In addition to the above enactments, there are provisions for appeal in many other corporate legislations like the Industries (Development and Regulation) Act 1951, the Industrial Disputes Act 1947, Workmen Compensation Act 1923, EPF Act, ESI Act etc to mention only a few. While format have been prescribed in many of these legislations, in few cases the appeals have to be prepared by the aggrieved party in his own way. Where formats are provided care should be taken to see that the details called for are filled in with meticulous accuracy. Where there is specific format, the party appealing shall provide as much details as possible in a cogent manner to enable the appellate authority to take a clear view of the earlier adjudication.

ANNEXURE I

SPECIMEN LOAN AGREEMENT WITH A FINANCIAL INSTITUIION

This loan agreement is made at Chennai on this the ....day of ...2006 between X Ltd (a company incorporated under the Companies Act 1956) and having its Registered Office at .... (hereinafter called the borrower) of the one part and ANGEL FINANCE LTD (a financial company incorporated under the State Finance Act, hereinafter referred to as the Institution) of the second part.

WHEREAS the borrower approached the institution for grant of a loan to meet the working capital requirement of the company;

AND WHEREAS the Institution has agreed to sanction the said loan for working capital requirements on the following terms and conditions.

NOW THIS AGREEMENT WITNESSES that the Institution hereby sanctions a loan of Rs.........to the borrower based on his application and the declarations made therein;

The borrower has agreed to secure the loan along with interest and cost by hypothecation of all movables including raw materials, goods in process and stores and spares available at the premises of the borrower at .... AND

The directors of the Company personally guarantee the loan to be made by the Institution to the Borrower.

The borrower shall pay interest on the loan at the rate of ....%

Per annum as agreed between the parties.

The borrower shall arrange to repay the loan in ....equal installments beginning six months from the date of disbursement and the borrower also agrees that in the event of default in payment of installments, he shall pay penal interest at ....% per annum.

The institution shall have the right to enter the premises of the borrower to verify and inspect from time to time regarding sales and availability of security etc.

The borrower shall not sell, assign, mortgage, lease or otherwise dispose of the hypothecated property without the prior permission of the Institution.

IN WITNESS WEHREOF the borrower has affixed his common seal hereunto on this ……….day of ……..and year first above written.

Signed sealed and delivered

BORROWER INSTITUTION

Witness:

1.

2.

ANNEXURE II

FORM NO.35

APPEAL TO THE COMMISSIONER OF INCOME TAX (APPEALS)

1. Name and address of the appellant
2. Permanent Account Number
3. Assessment year in connection with which the appeal is preferred
4. Assessing Officer/ valuation officer passing the order appealed against
5. Sec. and Sub. Sec of IT Act 1961 under which the assessing officer passed the order appealed against and the date of order
6. Where the appeal relates to any tax deducted under Sec.195(1) the date of payment of tax
7. Where the appeal relates to any penalty, the date of service of relevant notice of demand.

8. In any other case the date of service of the intimation of the order appealed against.

9. Sec. and Clause of IT Act 1961 under which the appeal is preferred

10. Where a return has been filed by the appellant for the assessment year in connection with which the appeal is preferred, whether tax due on the income returned has been paid in full (If the answer is yes, give details of the date of payment and amount.

11. Where no return has been filed by the appellant for the assessment year in connection with which the appeal is preferred, whether an amount equal to the amount of advance tax payable by him during the financial year immediately preceding such assessment year has been paid and if so details of payment.

12. Whether an appeal in relation to any other assessment year is pending in the case of the appellant with any Commissioner (Appeals) give details as to the:

   - Commissioner (Appeals) with whom the appeal is pending.
   - Assessment year in connection with which the appeal is preferred
   - Assessing officer passing the order appealed against.
   - Sec. and Sub sec. of the Act under which the assessing officer passed the order appealed against and the date of such order.

13. Address to which notices may be sent to the appellant.

Signed

(Appellant)

STATEMENT OF FACTS

GROUNDS OF APPEAL

Sd/-

(Appellant)

FORM OF VERIFICATION

I …………….the appellant do hereby declare that what is stated above is true to the best of my information and belief.

Place **Signature**

Status of the Appellant

Date

ANNEXURE III

FORM NO.36

FORM OF APPEAL TO THE APPELLATE TRIBUNAL

In the Income Tax Appellate Tribunal

Appeal No………..of …………

Appellant ……………………..

Vs

Respondent ………………

1. The State in which the assessment was made
2. Sec. under which the order appealed against was passed.
3. Assessment year in connection with which the appeal is preferred.
4. Total income declared by the assessee for the assessment year referred to in Item No.3
5. Total income computed by the Assessing officer for the assessment year referred to in item no.3

6. The Assessing Officer passing the original order.

7. Sec. of the Income Tax Act under which the assessing officer passed the order.

8. Deputy Commissioner of Appeals in respect of orders passed before the 1st day of Oct. 1998 and Commissioner of appeals passing the order.

9. The Chief Commissioner or Director General or Director or Commissioner passing the order.

10. Date of communication of the order appealed against.

11. Address to which notices may be sent to the appellant.

12. Address to which notices may be sent to the respondent.

13. Relief claimed in Appeal.

GROUNDS OF APPEAL

1.

2. etc.

Signed

Appellant

VERIFICATION

I...............appellant do hereby declare that what is stated above is true to the best of my information and belief.

Verified today ....day of ....

Signed

Appellant

Review Questions:

1. State the pre-requisite to make an application for a loan to Public Financial Institution.
2. What is Consortium lending? What are its advantages?
3. Enumerate the different appellate authorities under the Foreign Exchange Management Act 1999.
4. Draft a specimen agreement with a Financial institution for securing a loan.
5. Explain the avenues of appeal to an aggrieved party under the Income Tax Act 1961
6. Draft a specimen appeal to the Appellate tribunal under the Income Tax Act 1961.

* * *

UNIT – 6

DEEDS OF POWER OF ATTORNEY

POWER OF ATTORNEY

A Power of Attorney is a deed Poll. It requires authentication as provided in Sec.85 of the Indian Evidence Act. The definition given in Sec.1A of the Power of Attorney (amendment) Act 1982 defines a Power of attorney as **an instrument in writing empowering a specified person to act** for and in the name of the person executing it. It is an authority conferred by the executor of the Power of attorney to the other person to do such acts like receiving rent, debts, making application in courts etc on his behalf.

A Power of Attorney does not ordinarily require registration under the Registration Act. However where it creates an interest in any immovable property or gives the right to sell any property, it requires registration. A Power of attorney can be executed in favour of one person or more than one person. Where it is executed in favour of more than one person, it has to be exercised jointly unless otherwise stated. A Power of Attorney can be a General Power of Attorney where it is executed to generally represent another person or it may be a Particular Power of Attorney where it is executed for the purpose of Specific Act or acts forming part of one transaction.

Power of Attorney is a **Contract of Agency**. The matters relating to Power of attorney are therefore guided by the Indian Contract Act.1872. An Agent is a person who represents the Principal in his business. He is authorized to do all such acts which a Principal is authorized to do. A Power of attorney being a Contract of agency, all the provisions governing these contracts also apply to it.

Any person competent to Contract can be an agent. A person of unsound mind and who has not attained majority cannot be appointed as a power of attorney. Similarly a power of attorney can be executed by a person competent to contract but Sec.5 of the Power of Attorney Act 1982 provides that a married woman whether major or minor can also execute a Power of attorney. The law of agency under Sec.185 of the Indian Contract Act 1872 specifies that no consideration is required to create an agency. So a Power of attorney also does not require any consideration.

A Power of attorney **need not be attested**. However it is advisable to execute the power of attorney before and have it authenticated by a Notary public or any Court Judge/ Magistrate or vice Consul or representative of Central Government. This will create a presumption for the courts under the Indian Evidence Act. Where a Power of attorney is executed for the purpose of presenting any documents for registration with an authority under Registration Act, then the Power of attorney, it must be executed before and authenticated by the Registrar or sub-registrar.

A Power of attorney will remain in force based on its nature. A General Power of Attorney will remain in force until either party revokes the same expressly or is determined by the death of either party. A particular power of attorney will be valid only till the purpose for which it was executed is completed or if its completion becomes impossible.

REVOCABLE AND IRREVOCABLE POWER OF ATTORNEY

A Power of Attorney executed in favour of a person can at the discretion of the donor thereof be revoked at any time. However where the donee himself has an interest in a Power of attorney, it becomes an agency coupled with interest and hence cannot be revoked unilaterally by the executor. An agency coupled with interest is an example of an irrevocable power of attorney. Power of attorney executed in favour of financial institutions to empower them to execute security documents etc. is an example of irrevocable power of attorney.

CONSTRUCTION OF A POWER OF ATTORNEY

Powers of Attorney are strictly construed. Any person dealing with others acting under powers should enquire into the authenticity of the documents. The general words used in a power of attorney should be read with the specific powers conferred on the donee. 'A power to pay' is not the same as 'a promise to pay'. A power of attorney to negotiate or assign does not include the power to pledge.

In interpreting a power of attorney, regard must be had for the recitals which show the scope and object of power. For example if the recital states that the Principal is going on vacation, it should be construed that the authority

existed only in the absence of the principal. Where special powers are afforded by general words, the general words are to be construed only to the limited extent of exercise of the special powers. · If it is challenged that the person exceeded his authority under the power of attorney, it is necessary for the defendant to show that the power is within the confines of the instrument of power of attorney.

POWER OF ATTORNEY BY COMPANIES

A Company being an artificial person is entitled to execute a Power of attorney. It is the normal practice of companies to delegate powers to persons to act on behalf of the company. The delegation is done a by a Board Resolution. The important condition for such delegation is that the provision for appointment of agents must be there in the Articles of Association of the Company. Reg.84 of Table A has a similar provision in this regard. It is normal practice for companies to delegate powers to the Managing director to do all such acts as are necessary in the day to day administration of the company. Further a company can appoint any person under its common seal to execute any documents or instruments on behalf of the company.

LETTERS OF AUTHORITY

A letter of authority is nothing but a power of attorney. The difference between a letter of authority and a power of attorney is that, while a letter of authority is executed on a plain paper, a power of attorney is executed on a stamped paper. The law relating to Power of attorney will apply to the Letter of authority as well.

Specimen forms of Powers of Attorney are given in **Annexures I to III.**

APPEALS

The Code of Civil Procedure 1908 does not define the term 'Appeal'. An Appeal is an application by a party to an appellate court praying to set aside a decree or order of a court subordinate to it. It is a right granted by statue in certain circumstances, where the judicial authority is satisfied that grounds exist for appeal as per law. The Code of Civil Procedure 1908 has provisions for four kinds of appeals:

1) Appeal from Original Decrees

2) Second Appeal

3) Appeal from orders

4) Appeals to Supreme Court.

Appeal from Original Decrees

Sec.96 of the Code of Civil Procedure 1908 provides that an appeal shall lie from every decree passed by **any court exercising original jurisdiction** including a original decree passed ex-parte. The section further provides that no appeal shall lie from a decree passed with the consent of the parties. Similarly no appeal will lie against the order of a court of small causes where the value of the suit is Rs.3000 or less except on a question of law.

Second Appeal

Sec.100 of the Code of Civil Procedure 1908 stipulates that an appeal shall lie to the High Court from every decree passed in appeal by a court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. This second appeal in the High court may determine any issue which has either not be determined or wrongly determined by the appellate lower court provided there is sufficient evidence on record.

It has been provided in Sec.100-A of the Code that where an appeal from an appellate decree is heard and decided by a Single judge of the High Court, no further appeal shall lie from the judgment. Sec.101 also expressly bar appeals other than those given in Sec.100 of the Code.

Appeals from Orders

Sec.104 of the Code of Civil Procedure 1908 states that appeal shall lie from the following orders:

a) An order under Sec.35-A allowing cost
b) An order refusing leave to institute a suit under Sec.91
c) An order regarding compensation for arrest, attachment etc under Sec.95
d) Appealable orders under Order XLIII of Rule 1
e) An order imposing a fine.

Sec.106 of the Code provides that where an appeal from an order is allowed it shall lie to the court to which an appeal would lie from the decree in the suit in which such order was made or where such order was made by court in exercise of appellate jurisdiction, then to the High Court.

Appeals to the Supreme Court

Sec.109 of the Code of Civil Procedure 1908 provides that an appeal to the Supreme Court shall lie from any judgment, decree, or final order in a civil proceeding of a High Court, if the High Court certifies that the case involves a substantial question of law and that in the opinion of the High Court the question needs to be decided by the Supreme Court.

In addition to the above provisions of appeal, Articles 132,133 and 134 of the Constitution of India provide for appeal in certain cases.

Article 132 provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in Civil or Criminal Proceedings if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Similar provisions for appeal to Supreme Court against the orders of the High Court in civil proceedings and in criminal proceedings are provided under Article 133 and 134.

It is imperative upon the appellant in appeals to bring to the notice of the appellate court that the lower court has either not determined or wrongly determine a matter in issue including admission or non admission of evidence.

The Appeal document shall contain the memorandum of appeal, the grounds of appeal and the relief sought by the appellant.

A specimen format of appeal to the High Court is given in **Annexure IV.**

REVISION

This jurisdiction vests with the High Court. Sec.115 of the Code of Civil Procedure 1908 deals with the revisionary jurisdiction of the High Court.

This section provides that the High Court can call for records of any case which has been decided by **any court subordinate to it and in which no appeal lies** if the subordinate court

a) appears to have exercised a jurisdiction not vested in it by law or

b) appears to have failed to exercise jurisdiction vested in it by law or

c) appears to have acted in exercise of its jurisdiction illegally or with material irregularity.

The High Court in such cases may make such order as it thinks fit. The Section also provides that the High Court shall not vary or reverse an order made in the course of a suit except in cases where the order if varied or reversed would finally dispose of the suit or if it is allowed to stand would occasion failure of justice and irreparable injury to the party.

A specimen form of revision is given in **Annexure V.**

REVIEW

Sec.114 of the Code of Civil Procedure 1908 has a provision to an aggrieved party to seek a review of judgment to the Court which passed the decree or made the order. This can be made for decrees from which an appeal is allowed but not preferred or from which no appeal is allowed or from a decision of the court of small causes. Order XLVII Rule 1 of the Code provides that the review may be requisitioned where the applicant is of the view there was an apparent mistake or error on the face of the record or where he has new evidence which he could not produce earlier due to reasons beyond his control or for any other sufficient cause.

WRIT PETITIONS

The Constitution of India confers on the Citizens of India, certain Fundamental Rights. The Constitution also provides a remedy of enforcement of Fundamental Rights wherever they are denied. Two Articles in the Constitution confer this right on the Citizens of India. Art. 32 of the Constitution empowers the Supreme Court of India to issue directions or orders or writs including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and Certiorari* as may be appropriate to enforce the Fundamental Rights. Art.226 of the Constitution empowers every High Court to issue directions or writs as stated above within its territorial jurisdiction subject to the provisions of Art.32. We can briefly see the nature of the writs specifically stated in Art.32 and Art.226.

Habeas Corpus: The Writ of Habeas Corpus can be filed by a person detained without legal justification. It can also be filed by any person on his behalf. The Writ literally means "To have a body". If this writ is issued by the Court, it is incumbent on the authorities to produce the person before the court. Disobedience will attract contempt of Court.

Mandamus: This Writ is issued against a public authority and is in the nature of a command. The public authority who has a duty to perform under law and is forced to perform the duty through this writ. It is issued to any authority like corporation, lower court, Government authority etc. A Mandamus will not like against the President of India or the Governor of a State or any Private individual.

Prohibitions: This writ is issued against judicial authorities or quasi judicial authorities during the pendancy of the proceedings. This writ is issued where the court is of the opinion that the judicial authority is usurping its jurisdiction and is acting in violation of law.

Certiorari: This writ is issued against a body of person exercising a legal authority capriciously and injudiciously thereby affecting the rights of persons. This writ empowers the court to remove the proceedings from that authority which is acting illegally to the High Court.

Quo warranto: It is a writ in the nature of public interest litigation. If a person holds a public office created by Statue or is about to assume that office, the legality of his claim to the office can be questioned by this writ. The underlying principle of this writ is that no person shall occupy any official position without authority and if that be so the person should be removed from that position. It is not necessary that the person filing this writ should have been affected or his legal right infringed and is merely intended to safeguard usurping of public office.

A Specimen form of a Writ petition is given **Annexure VI.**

SPECIAL LEAVE PETITION

Every High Court passing a decree, judgment, order or sentence may either on its own or on the request of the aggrieved party is empowered to issue a certificate in all cases both civil and criminal under Art.134 A of the

Constitution that the case involves a substantial question of law as to the interpretation of the Constitution.

In cases where the High Court refuses to give this certificate to the aggrieved party to appeal to the Supreme Court against any judgment, decree or sentence passed by the High Court, the Constitution provides for another route to the aggrieved party to approach the Supreme Court.

Art.136 of the Constitution has a provision for Special leave to appeal to the aggrieved party. The article gives the Supreme Court the discretionary power to grant Special Leave to appeal to the aggrieved party against the judgment, decree, order or sentence of the High Court. Once this Special leave is granted, the aggrieved party can proceed on appeal to the Supreme Court. Moreover, Sec.112 of the Code of Civil Procedure 1908 provides that the power of the Supreme Court to grant Special Leave in any case beyond the scope of the Code of Civil Procedure.

A Specimen of Special Leave Petition is given in **Annexure VII.**

AFFIDAVITS

An affidavit is a statement on oath by a person deposing before any authority both judicial and quasi judicial. As it is made on oath the consequences are serious and the authority before which the affidavit is made can rely on the deposition to pass a judgment. Order XIX, Rule 1 of the Code of Civil Procedure 1908 stipulates that the person deposing in the affidavit must specifically state as to what portion he has affirmed based on his personal knowledge and what portion based on information which he has received and believes it to be true.

The affidavit should describe succinctly all matters on which deposition is made, divided into paragraphs cogently, indicate the source of information of the matters stated therein and also affirm that the deponent believes them to be true. An affidavit will attract stamp duty under the Indian Stamp Act 1899.

The oath of affirmation in the affidavit shall state the words "I swear" and "I solemnly affirm" to indicate the authenticity of the deposition made therein.

A specimen of affidavit is given in **Annexure VIII.**

ANNEXURE I

POWER OF ATTORNEY TO PRESENT DOCUMENT FOR REGISTRATION

By this Power of attorney, I, AB of etc do hereby appoint CD of, etc, my attorney for me and on my behalf to appear for me and represent me before the Sub Registrar of …………all times as may be necessary and present before him for registration the ….deed dated the …day of ……..made between , …..etc to admit my signature and execution of the said deed, to do any act or thing as may be necessary to complete the registration of the said deed in the manner required by law and when it has been returned to him after being duly registered to give proper receipt and discharge for the same.

And I, the said AB, do hereby agree and declare that all acts, deeds and things done, executed or performed by the said CD shall be valid and binding on me to all intents and purposes as if done by me personally which I undertake to ratify and confirm whenever required.

Singed sealed and delivered.

AB

Witnesses:

ANNEXURE II

POWER OF ATTORNEY TO OBTAIN LETTERS OF ADMINISTRATION ON BEHALF OF A PERSON RESIDENT ABROAD.

By this Power, I, AB the undersigned, the son of etc. state as follows:

WHEREAS (name of deceased) died on…….day of ……..leaving him surviving me as one of (state the relationship as one of the persons interested in his estate)
AND WHEREAS I am at present residing at ………

Now by this power of attorney I do hereby irrevocably nominate, appoint and constitute CD son of etc as my true and lawful attorney to do inter alia the following acts, deeds or things.

1. To apply for and obtain letters of administration in respect of the estate of the deceased from the court of competent jurisdiction for my use and benefit until when I shall apply for and obtain the same.
2. To apply for estate duty clearance for the purpose of such grant
3. To file the account and inventory in respect of said estate.
4. To appoint and engage any solicitor, counsel, advocate or other lawyer to sign and verify any petition for the grant, to affirm any affidavit or affidavits enter or lodge any caveat or to apply for its discharge.
5. To do all other acts, deeds and things as may be necessary or required in connection with the grant as aforesaid.

AND I, the said AB, do hereby agree and undertake to ratify and confirm all and whatsoever may said attorney shall lawfully do, execute, perform or cause to be done, executed or performed by virtue of the power or authority hereunder conferred upon.

In Witness Whereof etc.,,

Signed sealed and delivered.

AB

ANNEXURE III

IRREVOCABLE POWER OF ATTORNEY

This Power of attorney is made the ……….day of ……..by me, AB of, etc….

Whereas I have obtained this day from CD of etc. the sum of Rs……as and by way of loan agreeing to repay the same with interest thereon at …….percent per annum

And whereas it has been agreed between me and the said CD that the said CD would be authorized by me to sell my house No……situate at, etc and out of the proceeds of such sale adjust, appropriate and pay himself and liquidate the debt due to him:

NOW THIS DEED WITNESSES that for the consideration as aforesaid I hereby nominate, appoint and constitute CD my aforesaid attorney, in may name and on my behalf

State the relevant clauses of sale of property

To adjust appropriate and pay himself at the first instance out of the proceeds of such sale less all costs, charges and expenses the amount due to him and thereby to liquidate the debt payable by me to him and to pay the balance thereafter to me.

AND I hereby agree to ratify and confirm all and whatsoever my said attorney shall lawfully do or cause to be done by virtue of this deed. This power of attorney is irrevocable provided however that the constituted attorney shall keep and maintain proper account of the sale and allow me inspection thereof as and when demanded.

Description of property

In witness whereof etc.

Signed sealed and delivered AB

ANNEXURE IV

SPECIMEN OF APPEAL TO THE HIGH COURT

IN THE HIGH COURT OF ……….AT

CIVIL APPELLATE JURISDICTION

REGULAR CIVIL APPEAL NO………..OF ……..

IN THE MATTER OF:

AB, son of etc - Appellant

Versus

CD, son of etc - Respondent

May it please the Hon'ble Chief Justice of the High Court of ……..and his Lordship companion justices,

THE APPELLANT MOST RESPECTFULLY SHOWETH:

1. The Appellant AB is son of ……..residing at ……… is doing the business of manufacturing of ceiling fans at ………..

2. The respondents who are also doing the business of selling goods manufactured by the appellants. As per the agreement subsisting between the appellant and respondent, the appellant supplied goods worth Rs.50 lakhs to the respondent over a period of six months. The details are produced in the Annexure I to this appeal.

3. The respondents have made a total payment of Rs.15 lakhs on various dates. The details are produced in the Annexure II to this appeal.

4. The remaining amount has not been paid by the respondent inspite of repeated demands and the legal notice issued by the appellant.

5. The appellant filed a suit for recovery of the balance amount from the respondent amounting to Rs……….together with interest at ………% per annum. The suit was filed on ………in the court of the learned District Judge.

6. The respondent appeared through the counsel on being summoned and filed the written statement to which the appellant-plaintiff filed the rejoinder.

7. The learned District Judge, after the parties had led evidence and after hearing the counsel for both the parties, has by his judgment and decree passed on ……….dismissed the appellant's suit on the ground that the evidence led by the parties does not establish the claim of the appellant. The Copies of the judgment and decree are annexed as Annexure III and IV

8. Aggrieved by the aforesaid judgment and decree of the court below dismissing the suit of the plaintiff, this appeal is hereby filed on the following amongst others,

GROUNDS

a) That the judgment and decree under appeal are erroneous both on facts as well as law

b) That the learned trial court has failed to appreciate evidence and has erred in not finding that the preponderance of probabilities was in favour of the plaintiff-appellant.

c) That sufficient evidence was led by the plaintiff to prove the issues raised in the suit and the respondent failed to effectively rebut the plaintiff's evidence.

9. The valuation of this appeal for the purpose of payment of court fee is Rs……and the requisite court fee in the form of stamps is appended to this appeal.

10. This appeal is being filed within the period of limitation, the judgment and decree having been passed on………..

In the light of the above facts, the appellant prays that this appeal be allowed, the judgment and decree under appeal be set aside and decree prayed for by the appellant in his suit before the court below be passed together with up to date interest and cost of both courts.

APPELLANT

VERIFICATION

Verified at ……on this the…..day of ……….. That the contents of the above appeal are correct to the best of my knowledge and belief ……….

APPELLANT

THROUGH

{ ………………..}

ANNEXURE V

In the High Court of …………

Civil Appellate Jurisdiction

Civil Revision No………….. of …………..

IN THE MATTER OF:

AB s/o ……………….residing at ……………. - Petitioner

Versus

CD s/o…………….. residing at ……………….. - Respondent

AND

IN THE MATTER OF:

CIVIL REVISION AGAINST THE ORDER DATED …….PASSED BY THE LEARNED SUB JUDGE 1ST CLASS …….IN THE SUIT ENTITLED AB VS CD (CIVIL SUIT NO……..OF ………….

May it please the Hon'ble Chief Justice High Court and his Companion Justices

The petitioner MOST RESPECTFULLY SHOWETH:

1) The Petitioner named above has filed a suit against the respondents for the recovery of possession of a land situated in ……..fully described in the plaint. The suit is pending in the court of Sub-judge 1st class…….and the next date of hearing is ……….

2) That on being summoned the respondent appeared before the court below and filed his written statement wherein he denied the petitioner's title to the property.

3) That the trial court framed issues on ……….and directed the petitioner-plaintiff to produce evidence which the petitioner promptly did and also furnished a list of witnesses and deposited their expenses.

4) That on the previous date of hearing on ………two witnesses of the petitioner were examined by the court. However, the presiding officer of the court below passed an order that the remaining witnesses be produced by the petitioner without the assistance of the court despite request from the petitioner that they be summoned by the court.

5) That on the next date of hearing on ………the trial court closed the evidence on the ground that the remaining witnesses were not produced.

6) That the impugned order has caused great prejudice to the petitioner and if allowed to stand the suit of the petitioner will fail.

7) That the trial court has unjustly denied the assistance of court to secure the attendance of witnesses.

In the facts and circumstances of the case, the petitioner prays that this Hon'ble Court be pleased to quash and set aside the order under revision and direct the court below to provide assistance of the court for summoning the plaintiff witnesses.

PETITIONER

ANNEXURE VI

SPECIMEN FORM OF WRIT PETITION

In the High Court of …………..at ………

Civil Original (Extraordinary) Jurisdiction

Civil Writ Petition No………….of ………..

In the matter of:

XY s/o ………………residing at …………….former employee (Supervisor A Grade) in the respondent Company.

- Petitioner

ABC Company Ltd a company wholly owned by the Government of India and having its Registered office at …………..through its chairman.

Managing Director of the Company

- Respondents

Civil Writ Petition against the order dated ………passed by the Managing Director, respondent No.2 herein, by which the services of the petitioner as an employee of the respondent company have been terminated.

May it please the Hon'ble Chief Justice of the High Court of …………and his Lordship's Companion judges

The Petitioner

MOST RESPECTFULLY SHOWETH:

1. That the petitioner is a citizen of India and is therefore entitled to enjoy all the rights guaranteed by the Constitution of India.

2. That the respondent company is registered under the companies act 1956 having its registered office at…………

   The respondent company is wholly owned by the Government of India and is thus an instrumentality of the State as given in Article 12 of the Constitution.

3. That the petitioner was an employee of the respondent company having been appointed as Supervisor A Grade on………..and he continued to work and earned promotion also.

4. That on ………respondent Managing Director herein abruptly issued the impugned order dated ……….terminating the services of the petitioner and the petitioner came to be relieved of his duties the same day. A copy of the impugned order is annexed hereto.

5. That on a bare reading of the impugned order it becomes clear that the order has been issued on the basis of some alleged misconduct on the part of the petitioner but no enquiry under the relevant rules has been held before passing the impugned order.

6. That the petitioner has not committed any act that could be termed to be an act constituting misconduct.

7. The impugned order is being assailed on the following amongst other

GROUNDS

a) That the petitioner being a permanent employee of the respondent-company his services could not be terminated without holding an enquiry under the rules of the company.

b) That the principles of natural justice have been contravened by the respondents in not giving the petitioner an opportunity to present his case.

c) That the impugned order is otherwise also erroneous and unsustainable as it does not contain any reason and is a non-speaking order.

d) That the impugned order is arbitrary and contravenes article 14 of the Constitution.

PRAYER

In the facts and circumstances stated above the petitioner prays that a direction in the form of a writ of quo warranto and mandamus or any other writ be issued quashing the impugned order and reinstating the petitioner in service with all consequential benefits including back wages.

It is further prayed that the respondents be burdened with costs.

PETITIONER

THROUGH

COUNSEL

The writ petition must be supported by an affidavit of the petitioner.

ANNEXURE VII

SPECIMEN OF SPECIAL LEAVE PETITIONER TO THE SUPREME COURT

CIVIL APPELLATE JURISDICTION

IN THE MATTER OF:

Special Leave Petition under Article 136 of the Constitution of India

AND

IN THE MATTER OF:

AB Company ltd having its Registered Office at ……………through its Managing Director - Petitioner

Versus

1. 1….. s/o ………………..residing at ………………
2. Union of India through the Secretary Department of Company affairs, New Delhi.
3. The Registrar of Companies.

Respondents

May it please the Hon'ble Chief Justice of India and His Lordship's Companion judges of Supreme Court

The Petitioner-appellant company

MOST RESPECTFULLY SHOWETH

1. That the petitioner is Company incorporated under the Companies Act 1956 having its registered office at ………..and is challenging by way of this Special Leave Petition the judgment and order of the High Court of ……..dated ……..in proceedings under sec……of the Companies Act.
2. That the questions of law involved in this matter are as follows:
   (a) Whether the High Court has erred in taking the view that ………..?
   (b) Whether it would be good ground for winding up the petitioner company as two of its directors are not on speaking terms and thus there is a dead lock in administration of the company.
   (c) Whether…………………(state any other ground)

3. That the respondent no.1 has filed a petition before the Hon'ble High Court of ……………seeking relief ………which petition was contested by the petitioner company inter alia on the grounds that ……………
4. That the High Court after hearing the parties through their respective counsels allowed the said petition holding that sufficient grounds had been made out for winding up of the petitioner company.

5. That the aforesaid findings and final judgment of the High Court are assailed on the following, amongst others:

GROUNDS

5.1. That ....

5.2. That ....

5.3. That..........

6. That the Petitioner has not filed any appeal or other proceeding relating to this matter in this Hon'ble High Court or any other court.

RELIEF

The Petitioner Company accordingly prays that this Hon'ble Court be pleased to grant Special Leave to appeal in the matter and to allow the appeal, set aside the impugned order passed by the High Court and dismiss the petition filed by the respondent No.........in the High Court.

PETITIONER

AFFIDAVIT

IN THE HON'BLE SUPREME COURT OF INDIA

IN THE MATTER OF:

.... Petitioner

Versus

1...........

2...... .....

3........... Respondents

AFFIDAVIT

I ……………company through the petitioner in the Special Leave Petition titled as above do hereby solemnly affirm and state as under:

a) That I am the chairman and Managing Director of the petitioner company and am fully aware of and conversant with the relevant facts concerning the matter in issue in this petition.

b) That the contents of the accompanying Special Leave Petition are true and correct to the best of my knowledge and belief.

c) That no relevant fact has been concealed or kept back in the Special leave petition.

I further solemnly affirm at…………..(place) this the…………day of …………that the above averments are true and correct. Nothing has been kept back or concealed.

DEPONENT

ANNEXURE VIII

SPECIMEN AFFIDAVIT OF A CREDITOR IN PROOF OF HIS DEBT IN PROCEEDING FOR LIQUIDATION OF A COMPANY

IN THE HIGH COURT OF …………………

The matter of the Indian Companies Act 1956

AND

The matter of the liquidation of ………..company ltd.

I AB aged ....years s/o of Shri.........................resident of ....do hereby on oath (or on solemn affirmation) state as follows:

1. That the above named company was on the ....day of ...., the date of order for winding up the same and still is and justly and truly indebted to me in the sum of Rs..............(Rupees ....only) in account of (describe the nature of the debt)
2. That in proof of the aforesaid debt I attach hereto the documents marked A, B, C.
3. That I have not nor have any person or persons by my order or to my knowledge and belief for my use, received the aforesaid sum of Rs.............or any part thereof or any security or satisfaction for the same or any part thereof except the sum or security (state the exact amount of the security)
4. That this my affidavit is true that it conceals nothing and no part of it is false.

Date:

Sd/ AB

DEPONENT

VERIFICATION

I the above named deponent, verify that the contents of Para 1 to 4 of this affidavit are true to my personal knowledge.

Sd/-

Dated:

I ....s/o ....residing at............declare that from a perusal of the papers produced by the deponent before me that I am satisfied that he is AB .

Sd/-

Solemnly affirmed before me on this ……………..day of ………of ……….(time) by the deponent.

Sd/-

(Oath Commissioner)

Review Questions:

1. A Power of Attorney is strictly construed. Explain this statement with reference to the drafting of a power of attorney.
2. A letter of authority is similar to a power of attorney in all respects. Do you agree?
3. What is an irrevocable power of Attorney? Draft a specimen power of attorney.
4. Describe the provisions of appeal against orders of the court as given in the Code of Civil Procedure.
5. Draft a Specimen writ petition with all the necessary legal provisions.
6. Distinguish between a review petition and a revision petition.

* * *

MODEL QUESTION PAPER

Paper 4.1 : DRAFTING AND CONVEYANCING

Time : 3 hours | Max : 100 marks

SECTION-A (5 x 8 = 40 marks)

Answer any **Five** questions

1. Explain the terms (a) Habendum (b) Testatum and (c) Testimonium.
2. What is a Charge Sheet? What are the normal contents in a Charge sheet?
3. Distinguish between a mortgage and a charge. Is there any difference in their drafting?
4. State the salient features of a Gift deed.
5. Explain the various appellate authorities under the Foreign Exchange Management Act 1999.
6. Define an Affidavit. What are the important aspects to be kept in mind while drafting an affidavit?
7. Draft a specimen of a dealership contract.
8. What are General and Special Power of attorney? What is their effect on the transaction?

SECTION-B (4 x 15 = 60 marks)

Answer any **Four** questions

9. State the rules for drafting. What are the basic requirements of a deed of transfer?
10. Draft a specimen order of appointment. State the important points to be incorporated therein.
11. What is a deed of further charge? Draft a specimen of a deed of further charge.
12. Policies of Insurance can be assigned. Explain this statement and explain the salient features of assignment of a life insurance policy.
13. Draft a Special Leave Petition under Article 136 of the Constitution of India.
14. What are the salient features of an arbitration agreement? To what extent it will bind the parties?
15. (a) Draft a Memorandum of Pledge of Movables.

    (b)What are the salient features of a deed of appointment of a receiver.

REFERENCE BOOKS

1. ICSI Material - Secretarial Practice Relating To Economic Laws

2. Conveyancing - By Desouza

3. The Indian Draftsman – Guide To Legal Drafting – Hargopal

4. Code of Civil Procedure 1908

5. The Indian Contract Act - 1872

6. The transfer of Property Act 1882



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